

(25,886)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1056.

THOMAS GILCREASE, PETITIONER,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW,  
AND AL BROWN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF OKLAHOMA.

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a In the Supreme Court of the State of Oklahoma.

No. 5773.

THOMAS GILCREASE, Plaintiff in Error,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants in Error.

(Filed Nov. 10, 1913. W. H. L. Campbell, Clerk.)

*Petition in Error.*

Comes now the Plaintiff in Error and shows to this Court that by consideration of the District Court of Tulsa county, Oklahoma, in a certain action therein pending, wherein this plaintiff in error was plaintiff and the said defendants in error were defendants, the said defendants in error recovered a judgment against this plaintiff in error dismissing his petition without relief and for the costs of the action. There is manifest error in the proceedings of the said court, and in the record in said cause, as more fully appears from the case-made duly settled, signed and attested in said court and which is hereto attached markes "Exhibit A" and made part hereof.

That plaintiff in error complains and assigns as error in the proceedings in the court below specifically the following errors:

First. The court erred in admitting irrelevant, incompetent and immaterial evidence offered by defendants in error, to which rulings of the court plaintiff in error at the time excepted and excepts.

Second. The court erred in rejecting relevant, competent and material testimony offered by plaintiff in error and rejected by the court, to which plaintiff at the time excepted and excepts.

b-e Third. The court erred in not separately stating findings of fact and conclusions of law as requested by plaintiff in error to do at the time the cause was submitted and before judgment.

Fourth. The court erred in holding as a matter of law that the conveyances of a minor Creek Indian allottee were not absolutely void.

Fifth. The court erred in holding as a matter of law that a conveyance made by a minor Creek Indian was susceptible of ratification at or after attaining majority.

Sixth. The court erred in holding that the findings of fact made by the court were sufficient to sustain the judgment rendered.

Seventh. The findings of fact made by the court are not sustained by the evidence and are contrary to the evidence.

Eighth. The conclusions of law made by the court are contrary to the law.

Ninth. The judgment is contrary to law and is not sustained by sufficient evidence, and is contrary to the evidence.

Tenth. The court erred in overruling the motion of plaintiff in error for new trial.

Wherefore, Plaintiff in Error prays that said judgment be reversed, the cause remanded with instructions to the court below to re-state its conclusions of law and render judgment therein for plaintiff in error or grant a new trial, as this Court may under the law determine to be just, and lawful, and that plaintiff in error recover his costs herein, and for such other and further relief as is consistent with equity and good conscience.

BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff in Error.*

\* \* \* \* \*

1 In the District Court within and for the County of Tulsa,  
State of Oklahoma.

No. 3125.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL  
BROWN, Defendants.

Be it remembered, That heretofore to-wit, on the 14th day of February, 1912, the plaintiff, Thomas Gilcrease, commenced his action against the Defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, by filing his petition in the District Court within and for the county of Tulsa, State of Oklahoma.

Which said petition is in the words and figures following, to-wit:

2 STATE OF OKLAHOMA,  
*Tulsa County, ss:*

In the District Court.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL  
BROWN, Defendants.

*Petition.*

Comes the plaintiff, Thomas Gilcrease and complains of the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, and for his cause of action states:

That the plaintiff is a citizen by blood of the Creek or Muskogee Nation or Tribe of Indians having been enrolled on the tribal rolls of said nation made by the Dawes Commission to the Five Civilized Tribes, June 9, 1899, as of the age of nine years, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

That as such citizen and member of the Creek Nation or Tribe of Indians said plaintiff was entitled under agreement between the United States of America and the Creek or Muskogee Nation of Indians, embraced in the Act of Congress, approved March 1, 1901, and ratified by the Creek Nation May 25th, 1901, and the Supplemental Agreement between the United States of America and

3 the Creek Nation, approved June 20th, 1902, ratified by the Creek Nation, July 26th, 1902, and proclaimed by the President August 8, 1902, to an allotment of land out of the lands of said Creek Nation, consisting of One Hundred and Twenty Acres of Surplus and forty acres of homestead, and there was duly selected as the surplus allotment of said plaintiff out of the lands belonging to said nation, the following described premises to-wit:

South One-half of the Northwest Quarter, and the Northeast Quarter of the Southwest Quarter of Section Twenty-two, Township Seventeen North, of Range Twelve East,

and a patent for said land was duly executed by the Principal Chief of the Creek Nation as provided by law under date of August 25th, 1902, and duly approved by the Secretary of the Interior of the United States of America, December 15, 1902, and duly recorded in the records of the Commission to the Five Civilized Tribes at Muskogee in Record Book 2, at Page 35, and after having been thus duly executed, approved and recorded was delivered to this plaintiff, and this plaintiff thereby became vested with an absolute title in and to the land mentioned and described therein, and there was selected as the homestead allotment of said plaintiff out of the lands belonging to said Nation, the following described premises to-wit:

The Northwest Quarter of the Southwest Quarter of Section Twenty-Two, Township 17 North, of Range Twelve East,

and that said surplus and homestead contain together one hundred and sixty acres, and all lie and are situated in the County of  
4 Tulsa, and State of Oklahoma.

That the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown are all citizens of the State of Oklahoma, and residents of the city of Tulsa and County of Tulsa in said State.

That the defendant, G. R. McCullough, is now President of the First National Bank of Tulsa, Oklahoma, and A. E. Bradshaw is now Cashier of the First National Bank of Tulsa, Oklahoma, and that Al Brown is an officer and employee of said First National Bank, but in exactly what capacity he is employed in said bank this plaintiff has no information and is unable to make exact with any more definiteness than above stated. That prior to his acquisition

of his interest in the First National Bank of Tulsa, Oklahoma, G. R. McCullough had been a stockholder and officer in the Bank of Oklahoma, and that A. E. Bradshaw was also a stockholder in and an officer of said Bank of Oklahoma, of Tulsa, Oklahoma, and said McCullough and said Bradshaw acquired large interests in the First National Bank of Tulsa, Oklahoma, and affected a consolidation of the business of the Bank of Oklahoma with the First National Bank of Tulsa, Oklahoma, and said Bank of Oklahoma became merged in said First National Bank of Tulsa, Oklahoma. That the defendant, Al Brown, is now, and has for several years last passed been a business associate of said McCullough and Bradshaw. That the defendant, H. B. Martin, is an attorney at law and has been practicing law in the city of Tulsa, State of Oklahoma for about four years last passed, and was an attorney for the Bank of Oklahoma prior to its merging with said First National Bank of Tulsa, Oklahoma, and subsequent to the consolidation of said Banks has been an attorney for the First National Bank of Tulsa, Oklahoma.

That prior to the consolidation of the Bank of Oklahoma with the First National Bank of Tulsa, Oklahoma, said Bank of Oklahoma had nationalized and become the Oklahoma National Bank, of Tulsa, Oklahoma, and that the consolidation of said Bank of Oklahoma which had become the Oklahoma National Bank with the First National Bank of Tulsa, Oklahoma, was effectuated during the summer or early fall of the year 1911, the precise date of said consolidation this plaintiff is unable to state.

That during all of the period covered by the transactions hereinafter complained of all the defendants have been business associates, and connected with one another in various business relations.

That the land of the plaintiff here before described is situated in the oil field which is commonly known as Glen Pool, and is underlain with a large and valuable deposit of petroleum.

That in the month of September, 1906, after the opening of the Glen Pool field, the plaintiff herein by and through his father and guardian, William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Milliken embracing the lands herein before described, and said Milliken proceeded to develop same for oil and to drill upon said land between the fall of the year 1906 and the summer of 1909 in all forty-nine wells upon said lands.

That in August of 1909, forty-two of said wells were producing wells and there was being produced from said land more than twenty-five thousand barrels of oil per month.

That this plaintiff was then a minor, inexperienced in all business affairs, and without any knowledge of the real value of the property involved in this controversy.

That the defendants herein were all men of mature judgment, wide business experience, and extensive knowledge of the conditions existing in the Glen Pool Oil field and of extensive and accurate knowledge of oil properties situated in said field, and well knew the conditions and value of the particular property involved in this controversy and were all acquainted with its enormous value as an oil property.

That all of said defendants were well acquainted with this plaintiff and with his situation; with his want of age and experience, and knew that he had in fact no knowledge of the real value of his property, and that he was without business experience, judgment, capacity and discernment to deal with them or with others in regard thereto.

This plaintiff further avers that the defendants herein, and each of them, were well acquainted with the forms of departmental oil and gas mining leases upon the lands of Indian Allottees of the Creek Nation, and were well acquainted with the terms of such leases and of the lease made by the guardian of this plaintiff with William H. Milliken covering the lands hereinbefore described, and that said lease among its other terms contained the provisions that at its expiration on February 8, 1911, the lessee was to leave upon the premises all of the casing in each of the producing wells which he had drilled thereon, and that said wells so drilled and cased  
7 were worth, to the property under the condition which by the terms of said lease with Milliken they were to be left at the expiration thereof, and added, more than one hundred thousand dollars to the value of the property, and that the value of said property at the date of the expiration of the lease with Milliken would be more than three hundred thousand dollars, and also well knew that by reason of the youth, inexperience and want of business experience and want of judgment of the plaintiff herein the said plaintiff was not aware of the actual value of said property.

That sometime prior to the 24th day of August, 1909, the defendant, H. B. Martin, had been the regular retained and paid attorney of the plaintiff in this cause, and that said defendant, H. B. Martin, was at that time a member of the firm of Hainer & Martin, regular practicing attorneys of the city of Tulsa, Oklahoma, and that on or about the first day of January, 1909, the plaintiff herein had regularly employed and retained said firm of attorneys to counsel and advise him and to attend to his legal business; to collect moneys that were due him from rents and royalties accruing from the land hereinbefore described, and to advise and direct him in the management of his business affairs generally.

That the defendant, H. B. Martin while a member of the firm of Hainer & Martin, and while so retained and employed by this plaintiff had familiarized himself with the business affairs of the plaintiff and particularly with reference to the property in question in this suit, and the development of said property under the oil and gas mining lease hereinbefore referred to.

That the plaintiff reposed utmost confidence in the business  
8 judgment, faithfulness, integrity, and ability of said attorney, H. B. Martin, and made the office of said defendant, Martin, his headquarters from about the first day of January, 1909, and continued to make such office his headquarters during all of the times hereinafter mentioned, and that during said period this plaintiff was so thoroughly under the direction of said H. B. Martin and reposed such confidence in him, and in his advice, that he was willing to do almost without question anything that was counselled and directed

by said Martin or anything the said Martin said was right or proper for him to do.

That the plaintiff was conscious of his own want of personal experience, business judgment and ability, and relied implicitly upon the judgment, advice, suggestion and directions of said attorney, H. B. Martin, and such confidence in and dependence upon said attorney on the part of the plaintiff was well known to each and all of the defendants herein.

That said defendants, knowing the status and value of the properties herein before described, and well knowing the situation of the plaintiff in this cause with reference to his attorney, H. B. Martin, and knowing his want of business judgment and discretion, and his want of knowledge of the actual value of the property, and all of the facts herein set out, and they being desirous to possess themselves of this valuable piece of land, and to enjoy the wealth which it was producing, and would for a long period of time continue to produce, at some time prior to the 24th day of August, A. D., 1909, formed a conspiracy to defraud the plaintiff out of said property for a mere fraction of its real value and entered upon  
9 a conspiracy and agreement to do and perform all things which might become necessary to effectuate that purpose and to do and perform all things which are herein set out and complained of, and for the purpose of effectuating said design and carrying out said conspiracy, they did on or about the 24th day of August, A. D. 1909, and while the plaintiff herein was still a minor and incapable of making any valid lease of oil and gas mining properties or other contract with reference to the land hereinbefore described, procured the plaintiff to make and enter into an apparent oil and gas mining lease covering the lands hereinbefore described to begin at the expiration or cancellation of the William H. Milliken lease hereinbefore referred to, providing for a royalty of all oil produced and saved from said premises and one hundred dollars for the product of each and every gas well while same was being sold off the premises, and which apparent oil and gas mining lease appears of record in the office of the Register of Deeds in Book 70, at page 10, and a copy of which is attached to this petition marked exhibit "A" and made a part hereof to the same effect as if said instrument was set out in full in this complaint, and that it was the understanding and agreement at the date of the execution of said pretended lease above set out that whenever this plaintiff should become a lawful age he was to execute an oil and gas mining lease and to receive a cash consideration therefor of seventeen thousand dollars in money and a royalty of all oil produced from the premises.

That all of the negotiations at the time of making of said pretended lease above set out were made with the defendant, A. E.

Bradshaw, by and through the defendant, H. B. Martin, he,  
10 the said Martin, being at the time the regularly retained, paid and acting attorney of this plaintiff, and that said H. B. Martin actually prepared the lease hereinbefore referred to as exhibit "A," and made a part of this petition, and during all said negotiations so advised this plaintiff and counselled with him in



regard thereto, and then and there well knowing that said property was of the value as hereinbefore alleged, stated and represented to the plaintiff that a bonus of seventeen Thousand Dollars and a royalty of one-eighth of the oil produced from said premises was the best price that could be obtained for same, and was all that said property and premises were worth, and that said defendant, H. B. Martin, made said representations to the plaintiff for the purpose of inducing him to subscribe said paper writing thereby putting himself in a position where he would be prima facie lessor of said premises, and apparently bound to the defendant, Grant R. McCullough.

That at the time the defendant, H. B. Martin, and all of the other defendants, well knew that the actual value of a valid lease upon said property in a form as the one signed by the plaintiff to said Grant R. McCullough was at least Three Hundred Thousand Dollars, and that the representations made by the defendant Martin to the plaintiff were at the instigation of, and with the knowledge of, and concurrence therein of the other defendants and were made for the purpose of inducing the plaintiff to sign said paper writing, thereby putting himself in the position where he would be apparently bound, and effectuating their final consummation of their design to strip him of his property for a mere fraction of its value.

11 That the defendant- herein well knew that the paper writing of August 24th, 1909, hereinbefore set forth as exhibit "A" was not a valid instrument in law but they also knew that the plaintiff was unaware of the want of validity in said instrument because of said reliance upon the counsel and advice and direction of his attorney, H. B. Martin.

That prior to the 24th day of August, 1909, and to wit: on the 18th day of September, 1908, the plaintiff had executed a warranty deed for the lands herein before described to his mother, Lizzie Gilcrease, which deed was duly recorded in the office of the Register of Deeds in Record book 33 at page 529, in Tulsa county, Oklahoma, and so appeared of record on the 24th day of August, 1909, but that said conveyance or attempted conveyance to Lizzie Gilcrease was understood by the plaintiff in this cause and by said Lizzie Gilcrease and by all the defendants herein as being simply in trust for the plaintiff, and the defendants knew that the plaintiff had from said Lizzie Gilcrease a declaration of trust, and a deed, but that the defendants in furtherance of their design and for the purpose of so clouding the title of the plaintiff to said land as to make it as difficult as possible for him to recede therefrom, they procured the execution by said Lizzie Gilcrease to the defendant, Grant R. McCullough, on the 4th day of September, 1909, of a pretended oil and gas mining lease upon the property hereinbefore described, the recited consideration in said pretended lease being the consideration named in the lease of August 24th, 1909, from the plaintiff to said Grant R. McCullough, and no other consideration whatever in fact being

12 given, and further reciting that said Lizzie Gilcrease adopted, ratified and confirmed said lease from Thomas Gilcrease to Grant R. McCullough, a copy of said pretended oil and gas mining



lease from Lizzie Gilcrease to Grant R. McCullough of September 4th, 1909, is attached to this petition, marked exhibit "B," and made a part of this petition.

That said pretended oil and gas mining lease above set forth as exhibit "B" was prepared by the defendant, H. B. Martin, who was at the time duly retained, paid and acting attorney of the plaintiff, and the said Lizzie Gilcrease being at that time at the town of Eureka Springs in the State of Arkansas, said Martin made a trip to Eureka Springs and procured said Lizzie Gilcrease to sign and execute and deliver said paper writing all of which was done by the defendant Martin with the knowledge and consent and at the instance of the other defendants herein and done as a part and parcel of the conspiracy formed and entered into by and between the defendants herein and for the purpose of carrying out said design and conspiracy, and accomplishing their purposes of obtaining the property of the plaintiff herein before described for a nominal consideration which would be but a fraction of its real value.

That in the furtherance of said conspiracy the defendants on or about the 12th day of April, 1910, procured the appointment of A. E. Bradshaw as guardian of the plaintiff, the application for said appointment being made to the County Court of Tulsa county, Oklahoma, said application being made by the defendant E. A. Bradshaw, and the defendant, Bradshaw being represented therein by the defendant, H. B. Martin, and said H. B. Martin being at the  
13 time the regularly retained and paid attorney of the plaintiff herein, and that in order to procure the appointment of said A. E. Bradshaw as such guardian the defendant procured from the father of the plaintiff his written consent to such appointment and waiver of the right to act as such guardian.

That thereafter and on or about the 21st day of April, 1910, in furtherance of said conspiracy, and for the purpose of continuing the relationship between the plaintiff herein and the defendant Martin and the other defendants, said defendant Martin procured from the plaintiff herein a written contract of employment wherein and whereby the said defendant Martin, although still a member of the firm of Hainer & Martin, was employed individually as the attorney of the plaintiff to represent him in general in and about all of his litigation, and all business affairs for the term of one year from the 21st day of April, 1910, which contract was made and entered into with full knowledge of the other defendants herein. A copy of which contract is hereto attached, marked exhibit "C" and made a part hereof.

That on or about the 22nd day of October, 1910, the plaintiff applied to the defendants for a release from the apparent contract and agreement which he had entered into and herein before set forth, and which stood in the name of the defendant, Grant R. McCullough, but which was in reality for the benefit of all the defendants, and upon the defendants refusing to release said pretended contract, he counseled with his attorney, H. B. Martin, in whom he still reposed the utmost confidence, and who was still in his employ, and regularly retained and paid by the plaintiff, and was

14 advised by his said attorney that he would be compelled to carry out said pretended contract whether he wished to do so or not, and that he was bound thereby, although in truth and in fact said defendant Martin well knew that said pretended contract was not valid in law and could not be enforced and was not binding on the plaintiff, but said Martin advised the plaintiff that he would be compelled to carry out said contract as a part of the fraudulent and corrupt design previously formed by the defendants herein of obtaining the property of the plaintiff, and said defendant Martin further advised the plaintiff that if he could procure a part of said contract for a price double that at which the plaintiff had made said contract, the best thing for the plaintiff to do was to take back from Grant R. McCullough an assignment of a half interest in the same for the sum of Thirty Thousand Dollars, and in order to induce into the mind of said plaintiff that he, Martin was acting in perfect good faith, and to continue his domination over the plaintiff, and over the judgment of the plaintiff, said to him, that he, Martin, would take a half interest in said half. In other words, that they would each take an assignment of one-fourth interest from McCullough, and each pay fifteen thousand dollars therefor.

That the plaintiff still reposing confidence in his said attorney, and still being dominated by him, and still relying on such attorney's integrity and sound business judgment and ability, and on the representations so false- and fraudulently made by said defendant Martin for the purpose of carrying out the conspiracy herein alleged, the plaintiff acceded to said Martin's suggestions and

15 representations, and it was agreed that said Grant R. McCullough should assign to the plaintiff a one-fourth interest in his pretended lease and to the defendant H. B. Martin, a one-fourth interest in said pretended lease, and that the plaintiff should pay for such one-fourth interest the sum of fifteen thousand dollar-, and said H. B. Martin should pay for such one-fourth interest a like sum of fifteen thousand dollars.

That previous to the 22d day of October, 1910, the defendants had paid to this plaintiff the sum of four thousand dollars of the seventeen thousand dollars which they had on the 24th day of August, 1909, agreed to pay for the lease upon said premises, leaving still due to the plaintiff according to the terms of the pretended lease of August 24th, 1909, and the contract and agreement under which same was made, the sum of thirteen thousand dollars, and this plaintiff relying upon the representations of the defendants, and particularly of the defendant, H. B. Martin, his attorney, paid over to Grant R. McCullough the sum of Two thousand dollars in money, being the difference between said thirteen thousand dollars and the sum of fifteen thousand dollars, and which he, the plaintiff, was to pay for such one-fourth interest, and said transaction being in full satisfaction of all balance and remainder of the seventeen thousand dollars agreed to be paid the plaintiff under the lease of August 24th, 1909.

That although the defendant, H. B. Martin, represented that he was paying a like sum of fifteen thousand dollars to the defendant,

Grant R. McCullough, for an assignment of a one-fourth interest in the lease upon the premises hereinbefore described, said Martin did not in fact pay said sum of money or any other sum for the assignment to him by McCullough of the one-fourth interest to said Martin, and said McCullough for the purpose of carrying out their design fraudulently represented to the plaintiff that said payment of fifteen thousand dollars was actually made by Martin, and that McCullough had actually assigned to Martin a one-fourth interest in said leasehold estate, all of which representations the plaintiff herein at the time believed and relied on and continued to believe up until a few days previous to the filing of this petition.

That thereafter and to-wit: on the 8th day of February, 1911, which was the day on which it was understood by all the parties that the William H. Millkin lease hereinbefore referred to expired, the defendants herein in furtherance of the conspiracy and design hereinbefore alleged, and while the defendant, A. E. Bradshaw was still acting as the guardian of this plaintiff, never having been discharged by the court by which he was appointed or any other court, and while the defendant, H. B. Martin, was still retained, paid and acting as the attorney of the plaintiff, and while the closest business intimacy still existed between all of the defendants, and while the plaintiff was still relying upon the good faith of his guardian and of his counsel, and under the influence of his counsel and guardian, and while the plaintiff still believed the representations to him made by his attorney, Martin, and that he was bound by his former agreement with the defendant, Grant R. McCullough, and that Grant R. McCullough owned a one-half interest in the lease upon the premises, and that the plaintiff owned a one-fourth interest therein, and that the defendant, H. B. Martin owned the other one-fourth interest therein, and while the plaintiff was still unadvised of the actual value of the property and of the lease upon same, and was still without business experience and judgment necessary to enable him to appreciate the character of the transaction upon which he was about to enter, and while the property was still of the value hereinbefore alleged, and in the condition hereinbefore alleged, and while the plaintiff was still under the influence of the representations in regard thereto, which had been made to him by his counsel, guardian and the other defendants, and while the plaintiff was still incapable of making an oil and gas mining lease except through a duly appointed guardian, properly authorized thereunto by an order of the probate court by reason of the following Acts of Congress, to-wit: Section Seventeen and of the Act of Congress of June 30th, 1902, commonly known as the Supplemental Agreement, which is in words and figures as follows:

"And lease for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion

of its invalidity." And of Section Four of the Act of Congress of March 1st, 1901, which is in words and figures as follows, to-wit:

"Allotments for any minor may be selected by his father, mother, or guardian, in the order named and shall not be sold during his minority."

18 And also the Act of Congress of April 28th, 1904, section two whereof provides as follows:

"And full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlement of all estates of decedents, the guardianships of minors and incompetents, whether Indians, Freedmen or otherwise."

And also of the Act of Congress of March Third, 1905, Section one whereof provides:

"No lease made by any administrator, executor, guardian or curator shall be valid or inforcible without the approval of the court having jurisdiction of the proceeding."

And also of Section 19 of the Act of Congress of April 26th, 1905, which provides as follows:

"And every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions be and the same is hereby declared void."

And also of Section 20, which provides:

"That allotments of minors and incompetents may be rented or leased under order of the proper court."

And also Sections 2, 3, 5, & 6 of the Act of Congress approved May 27th, 1908, in words and figures as follows, to-wit:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottees if an adult, or by the guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed — years, without the privilege of renewal; Provided, that leases of restricted lands for

19 oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the—(age)—of twenty-one years and all females under the age of eighteen years."

Section 3:

"That no oil, gas or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior, as if this act had not been passed: \* \* \* all of which was known to the defendants, and the actual value of the property at the time being also known to the defendants, and the value of the wells upon the property being well known to the de-

defendants and it being well known by them to be of the value of not less than three hundred thousand dollars, the defendants fraudulently and corruptly induced the plaintiff, as the final step in the consummation of the conspiracy and design which they had entered into, to execute and deliver to them a certain paper writing purporting to be an oil and gas mining lease upon the terms  
20 herein before described, for a royalty of one eighth of the oil mined and saved from said premises and purported to vest in Grant R. McCullough a one-half interest, in the plaintiff, Thomas Gilcrease, a one-fourth interest, and the defendant, H. B. Martin, a one-fourth interest. A copy of said lease or contract is attached hereto, marked exhibit "D," and made a part hereof.

That by the terms of said contract or lease of February 8th, 1911, the defendant, Grant R. McCullough, purported to become the owner of one-half of the equipment on said premises and the defendant, H. B. Martin of one-fourth interest in said equipment then on said premises.

That the casing and lining in the forty-two wells upon the premises at that date was worth more than thirty-six thousand dollars. In other words, more than twice the amount of the bonus originally promised and agreed to be paid by the defendants to the plaintiff for the entire lease upon the whole premises with forty-two producing wells situated thereon.

That upon the execution of the lease of February 8th, 1911, herein before referred to as exhibit "D," the defendants procured the plaintiff to execute his note to the First National Bank of Tulsa, Oklahoma, for the sum of one thousand dollars to procure money for the purpose of employing hands and working the lease in question, and to purchase the necessary pumps, machinery and equipment for use upon said premises, and did not themselves invest or expend a single dollar in the development, equipment or working of said property, but bought all of the machinery which was bought for said premises on a credit and it was paid for out of the  
21 production from said premises, and that said property has produced and the defendants have taken therefrom since the 8th day of February, 1911, and there has been produced and saved from said premises and marketed and sold therefrom one hundred and seventy-five thousand barrels of oil of the value of Seventy-two Thousand Dollars, and that out of said production the plaintiff has received only the royalty of one-eighth plus one-fourth of the remainder after there was paid therefrom the operating expenses and amounts for the machinery and equipment to work said lease, and the defendants have received the other three-fourths of the proceeds of said lease over and above the royalty.

That on or about the 11th day of December, 1911, the defendant, H. B. Martin, offered to convey and did convey to this plaintiff for a valuable consideration in money and property then paid and delivered to said H. B. Martin, amounting to the sum of Thirty-one Thousand Dollars, and assigned and transferred to the plaintiff, three-fourths of the interest then held and claimed by said Martin in said lease, that is to say three-sixteenths interest in the entire



lease, and that said H. B. Martin had previously by an assignment which appears of record in the office of the Register of deeds of Tulsa county, Oklahoma, conveyed to the defendant, G. R. McCullough, who is the same person as Grant R. McCullough referred to herein, a one-fourth part of the interest claimed by Martin in said lease, which would be one-sixteenth's interest in the entire lease. A copy of said assignment from Martin to Gilcrease is hereto attached, marked exhibit "E," and made a part hereof, and a copy of said assignment from Martin to McCullough is hereto attached, marked exhibit "F" and made a part hereof.

That the defendants have since the 8th day of February, 1911, derived from sales of oil taken from said premises and appropriated to their own use that which was legally and equitably the property of this plaintiff, and the defendants, nor either of the defendants, had any right, title or interest of any right thereto.

That the defendant Al Brown claims an interest in said lease but the particular nature and character and extent of said interest this plaintiff is unable to state, nor is the plaintiff able to allege what proportion of the moneys derived from the sale of oil taken from said premises since February 8th, 1911, said defendant, Al Brown has received and appropriated to his own use.

That as hereinbefore stated and alleged, the only sum or amount ever paid by these defendants or either of them for the apparent lease obtained by them from the plaintiff through fraud and undue influence herein alleged and recited, was the sum of four thousand dollars, two thousand dollars of which has been repaid by the plaintiff in money and the other two thousand dollars of which has been paid many times over by moneys derived by the defendants from the sale of oil taken by them from said property so that there is now due from this plaintiff to the defendant nothing whatsoever, but on the contrary the defendants are indebted to the plaintiff in a sum exceeding thirty thousand dollars, for and on account of money which they have had and received as proceeds from the sale of oil taken from the premises and by them appropriated to their own

use and benefit, and by virtue of the fraudulent practices hereinbefore recited; and the plaintiff has not received a dollar of the defendants, but if it shall turn out that the plaintiff is mistaken in this, or if it shall be adjudged and determined that any sum is due from the plaintiff to the defendant or either of them on account of the matter and things herein alleged and stated, the plaintiff now and here offers to return and to repay to said defendants or such of them as the court may adjudge is entitled to receive same any such sum or sums as the court shall find such defendant or defendants entitled to, and to do full and complete equity in the premises, and hereby submits himself fully to the jurisdiction of this court and prays that an accounting be had between him and said defendants, and offers to do whatsoever shall be adjudged by the court to be right and proper for him to perform, but in the end that he may have cancellation and rescission of the pretended contract now held by the defendants and under which they claim the premises in question, and upon which the oil is being taken and produced

therefrom, and asks that the defendants and each of them be required to account fully for all oil or substance taken from said premises under said contract, and for all moneys that they have derived by reason of the same.

That at the time the plaintiff obtained the assignment from the defendant, H. B. Martin, of three-sixteenths interest in the lease of February 8, 1911, being three fourths of the interest in said lease claimed by said Martin, he paid said Martin by surrendering to said

24 Martin promissory notes theretofore given by said Martin to said the plaintiff for five thousand dollars, and cancelled an open account owed by said Martin to the plaintiff for borrowed money to an amount of thirty-five hundred dollars, and transferred to said Martin, one promissory note, executed by George W. Rose to the plaintiff for the sum of Three thousand dollars, secured by real estate mortgage, and also one note executed by S. C. Maxey and wife to the plaintiff for the sum of fifteen hundred dollars, secured by mortgage on real estate, and executed to said H. B. Martin, deeds of conveyance for the following described real estate situated in Tulsa, and Osage counties in the State of Oklahoma, to-wit: One deed for the South 50 feet of Lot 4, block 183, one deed for the East 37½ feet of Lot 12, Block 1, Bliss Addition, one deed for Lot 1, Block 2, Brennan Reed Addition, and one deed for Lot 8, block 1, Brennan Reed Addition, and one deed for Lots 6, 7, 8, 9, 10, 11, in Block 3, of the Northmoreland Addition, Tulsa, Tulsa county, Oklahoma, and one deed to the Southeast quarter of Section 25, Township 17 North, Range 12, East, in Tulsa County, Oklahoma, and one deed to the N. W. ¼ of Section Seventeen, Township Twenty North, Range 12 East, and the S. W. ¼ of the S. W. ¼ of Section 20, Township 20 North, Range 12 East, Osage county, Oklahoma.

That said paymnts, transfers and conveyances by the plaintiff to the defendant Martin were wholly without consideration for the reason that the alleged and apparent interest in the lease aforesaid, was acquired by him as a result of the conspiracy entered into and carried out by the defendants as herein stated, and obtained from this plaintiff by fraudulent practices herein set out, and the apparent consideration given by Martin to the plaintiff of Thirty

25 One Thousand Dollars above mentioned was in truth and in fact but a return from said Martin of all the property and all of the value received by the defendant Martin from the plaintiff at the time of the transaction whereby Martin assumed to assign to the plaintiff three sixteenths of the lease of February 8, 1911, and obtained from the plaintiff thirty one thousand dollars in choses in action and real estate.

That the property described herein is still producing large quantities of oil to-wit: more than fifteen thousand barrels per month and the monthly production is of the value of Nine thousand dollars taking the present market price. That the defendants or some of them are continuing to receive, and are appropriating to their own use nine sixteenths of the proceeds of the sales of oil produced from said premises, and that the plaintiff, although the rightful



owner of all of said oil has only received from said property seven sixteenths of the proceeds of the sales of oil therefrom after deducting the operating expenses plus his royalties of one-eighth of the entire production, and that the defendants unless restrained by proper order of this court will continue to produce oil from said premises and to appropriate 9-16ths of the oil so produced after deducting 1-8th royalty therefrom to their own use and benefit, and that it is necessary for the best interest of said property that oil continue to be produced therefrom, and that the operation of the wells upon said land be continued and oil taken therefrom, and to this end that some competent person be appointed receiver to take and receive and hold subject to the order of this court all that portion of the oil produced from said premises over and above the one-eighth royalty which by the terms of the instrument set out to be cancelled by this suit is due the plaintiff, and 7-1-ths of the products from said premises which by the terms of said instrument this plaintiff is entitled to have and received and which the defendants admit the plaintiff is entitled to receive.

That unless the property involved in this suit is continuously operated, that is to say, if said forty-two producing wells upon the premises described in this petition are shut down and oil not taken from them, such action will produce great damage to the property and the property will never again be worth as much after such wells are shut down as before they were so shut down.

Whereas, on the other hand if the defendants are allowed to continue the operations of said property and to continue to take oil therefrom they will continue to sell and dispose of same, and to appropriate 9-16ths of the proceeds to their own use and behoove, and the total amount of the oil in and under said premises will to that extent be damaged, and the only remedy which will be left to this plaintiff if he prevails in this cause will be a personal judgment for the value of the oil so taken by them and appropriated by them and appropriated to their own use, and the value sought to be recovered by the plaintiff herein will be greatly diminished.

Plaintiff further states to the court that both of the defendants, Al Brown and A. E. Bradshaw are now and have at all times been parties to the conspiracy herein alleged and set forth, and to the various acts and things that have been done in furtherance thereof, and have had full knowledge of all that has been done in the carrying out of said conspiracy, participating in the intent thereof, and in the fraud thereof, and are now claiming and asserting some right, and interest in and to the property in question by virtue of contracts and leases herein set out and referred to and which stand on the record in the name of the defendant, G. R. McCullough and H. B. Martin, but that the precise extent of the interest of each of such defendants is unknown to the plaintiff as is also the precise nature of the instruments or contracts, promises or agreements under which they are holding or claiming an interest in said property, but all of the apparent claims and interests of said defendants, Bradshaw and Brown, as of the other defendants,

are wholly fraudulent for and by reason of the matters and things in this petition set out.

Plaintiff further states that he did not at any time prior to the first day of February, 1912, know of the conspiracy between the defendants herein or of the interest in the said lease of said guardian, nor of said Al Brown, nor that the defendant Martin had not paid the fifteen thousand dollars for the one fourth interest in said lease, nor was he at any time prior to that date conscious of any of the frauds or undue influence of said Martin and of said Guardian or of any of the defendants herein, and had plaintiff known any of said facts, he would not have executed any of said instruments.

Premises considered, plaintiff prays:

First. That the defendants and each of them be required by proper order of this court to refrain from the sale or disposition of any oil now on hand taken from said premises described  
28 herein or which they are now taking from said premises which may be by them taken from said premises at any time during the pendency of this litigation and from receiving the proceeds of any oil which may have been taken from said premises and sold to any person, firm, or corporation, or now in the pipe line of any such person, firm or corporation, and for which they have not yet received payment.

Second. That some discreet and competent person, competent to manage and operate said lease be appointed receiver to take charge of 9-16ths interest in the lease hold upon the premises described herein now claimed by all the defendants and which 9-16ths interest the plaintiff claims in equity and good conscience to be his property, and which he is seeking to recover in this cause by cancellation of the instrument under which the defendants are claiming title to same, and that said receiver be empowered and authorized to market said 9-16ths of the whole amount of oil taken from said premises over and above the royalty and operating expenses, and to collect and receive moneys derived from the sale thereof and to hold same subject to the order and disposition of this court, and also to market that portion of any oil on hand at the filing of this suit which would be the part thereof claimed by the defendants under the instrument the cancellation of which is sought in this action, and to receive money for the same and hold said money subject to the order and disposition of this court, and also to collect and receive, pay for the portion of any oil now in the hands of any person or company and claimed by the defendants which would  
29 have been coming to the defendants had this suit not been instituted and to hold all of said moneys subject to the order of this court, and to do such other and further things as the court shall by its order of appointment or any order subsequently made thereto, and to join with the plaintiff herein the operations of said premises, and to do and perform all such acts in furtherance thereof and in relation to such premises, and the property as will protect the rights of all parties hereto under the authority and direction of this court by its order of appointment and such other and further order as the court shall from time to time make.

Third. That the defendants and each of them be required to answer this bill of complaint and to show, but not under oath, answer under oath being hereby expressly waived, what amount of oil has been taken from the premises by them since the 8th day of February, 1911, exactly what amount has been expended by them for the equipment and for operating expenses, and exactly what sum they and each of them have derived and received from said proceeds in sales of oils taken from said premises, over and above the 1-8th royalty paid to the plaintiff and to state and set forth such sums and portions as may have been paid by the plaintiff as his admitted share of the transaction from the lands and premises described herein, and generally to account to this plaintiff for any and all sums of money, all property, assets and values of every description that they or each of them have received from the premises mentioned and described in this petition or from or by virtue of any of the transactions herein complained of, to the end that the proper amount which may be due from each of said defendant- to the plaintiff for and on account of said matters and things may be ascertained and determined, and  
30 that upon such accounting the plaintiff have judgment against said defendants and each of them for any and all sums which may be shown to have been received and obtained by them.

Fourth. That the court decree the cancellation of each and every of the several instruments under and by virtue of which the defendants herein or either of them are claiming and asserting any right, title or interest in or to the premises in controversy or the oil or gas in and under said premises, or any leasehold interest therein or thereto, or any right to mine and to take oil and gas therefrom, and particularly that this court by its decree cancel, set aside and hold for naught the apparent lease of the plaintiff to the defendant Grant R. McCullough *R. McCullough*, dated August 24th, 1909, and the pretended lease of Lizzie Gilcrease to Grant R. McCullough of September 5, 1911, and the pretended lease of Thomas Gilcrease to H. B. Martin and G. R. McCullough of February 8th, 1911, and the pretended assignment of H. B. Martin to G. R. McCullough of March 23d, 1911, and that each and every of said instruments be declared null and void, and the defendants and each of them and all persons claiming by, through or under them or either of them be forever enjoined from asserting any right, title, interest or claim in and to said premises or any oil under said premises under and by virtue of any or either of said pretended contracts, leases, assignments and agreements, and that the title of the plaintiff in and to the premises hereinbefore described and the oil and gas therein and thereunder be quieted against the pretended interests of each and all of the defendants herein.

Fifth. That the defendant, H. B. Martin be required to  
31 restore and refund to the plaintiff all the property acquired from the plaintiff under and by virtue of the transaction of December 11, 1911, herein before particularly set out and to repay to the plaintiff the amount for which said defendant Martin received credit on his note and indebtedness, and if he has not con-

verted into money the choses in action delivered by the plaintiff to him, being made by third parties secured by real estate mortgages, that said notes be required to be by said defendant Martin returned and reassigned to the plaintiff, and that as to all of the real estate conveyed by the plaintiff to Martin, that the said conveyances from the plaintiff to Martin be cancelled, set aside, and held for naught and the title thereof reinvest in the plaintiff as fully and to the same extent as if any conveyances whatsoever had never been made by him to the defendant Martin, and if it appears that any of said real estate or choses in action has been disposed of by said Martin so that it cannot be restored in kind or the title thereto reinvested in the plaintiff, that the defendant Martin be required to repay to the plaintiff the value ther-of, and that any receiver appointed for the disputed portion of the oil involved in this cause be also authorized and directed to take charge of any of the choses in action transferred by the plaintiff to the defendant Martin during the pendency of this litigation, and to collect and receive from the debtors in said choses in action sums of money evidenced by the same or any part thereof remaining unpaid, and to do and perform any and all things necessary therein, and to hold the proceeds thereof subject to the order and discretion of this court.

32 Sixth. That the court make and enter any such further decree and make all such other and further orders herein as may be, and which the court shall in equity and good conscience deem proper.

P. C. WEST AND  
BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff.*

STATE OF OKLAHOMA,  
*Tulsa County, ss:*

Thomas Gilcrease, of lawful age, being first duly sworn on his oath states, that he has read the above and foregoing petition; knows the contents thereof, and that the statements and allegations therein contained are true.

THOMAS GILCREASE.

Subscribed and sworn to before me this 14th day of February, 1912.

[SEAL.]

W. W. STUCKEY,  
*Clerk District Court,*  
By J. Q. CHAMBERS, *Deputy.*

33

EXHIBIT "A."

*Oil and Gas Mining Lease.*

This Agreement, Made this 24th day of August, 1909, by and between Thomas Gilcrease, Party of the first part, and Grant R. McCullough, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of Seventeen Thousand (\$17,000.00) Dollars, the receipt of which is hereby acknowledged, and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased and does by these presents grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns all the oil and gas in and under that certain tract of land hereinafter described and also all the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa county, State of Oklahoma, and described as follows, to-wit:

The South Half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North Half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) North of Range Twelve (12) East of the Indian Meridian, containing 160 acres.

The said party of the first part grants the further privilege unto the party of the second part, his heirs, successors and assigns of using sufficient water and gas from the premises Necessary to the operations thereon and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time, machinery or fixtures placed on the premises by said party of the second part.

To have and to hold the same unto the said party of the second part, his heirs, successors and assigns, for the term of fifteen years and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the time of the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, and the said term of this lease shall run for fifteen years thereafter and as long thereafter as oil and gas is being produced as aforesaid.

In consideration whereof the said party of the second part agrees to deliver to the party of the first part, in tanks or pipe lines, the one-eighth ( $\frac{1}{8}$ ) part of all oil produced and saved from the leased premises. And should gas be found on said premises in paying quantities, said party of the second part agrees to pay One Hundred (\$100.00) Dollars yearly, for the product of each gas well while the same is being sold off the premises, but the party of the second part shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

All rentals and other payments may be made directly to the party of the first part or may be deposited to his credit at the Bank of Oklahoma in the City of Tulsa.

All the conditions and terms of this grant and lease shall

extend to and be binding upon the heirs, successors and assigns of the parties hereto.

In Witness Whereof, We have hereunto set our hands this 24th day of August, 1909.

THOS. GILCREASE,  
*Party of the First Part.*  
GRANT R. McCULLOUGH,  
*Party of the Second Part.*

36 STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

On this 24th day of August, 1909, before me, A. B. Davis, a Notary Public, in and for said county and State, personally appeared Thomas Gilcrease, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal, this 24th day of August, 1909.

[SEAL.]

A. B. DAVIS,  
*Notary Public.*

My commission expires November 26, 1911.

Filed for record in Tulsa, Okla., Aug. 25, 1909, at 4 o'clock P. M.

[SEAL.]

H. C. WALKLEY,  
*Register of Deeds.*

STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

I, H. C. Walkley, Register of Deeds, in and for the county and State above named, do hereby certify that the foregoing is true and correct copy of a like instrument now of record in my office and recorded in Book 70, page 11.

Dated the 19 day of Feb. 1912.

H. C. WALKLEY,  
*Register of Deeds.*

37

# EXHIBIT "B."

## *Oil and Gas Mining Lease.*

This agreement, made and entered into on the 4th day of September, 1909, by and between Lizzie Gilcrease, party of the first part, and Grant R. McCullough, party of the second part.

Witnesseth: That said party of the first part, for and in consideration of the sum of One (\$1.00), and other good and valuable considerations, the receipt of which is hereby acknowledged and for the



further consideration of the rents, covenants and agreements herein-after provided, has granted, demised, let and leased, and does by these presents, grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns, all the oil and gas in and under the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa county, State of Oklahoma, and described as follows, to-wit:

The South One-half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North One-half ( $\frac{1}{2}$ ) of the southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) North Range twelve (12) East of the Indian Base and Meridian, containing One Hundred and Sixty (160) acres more or less.

The said party of the first part grants the further right and privilege unto the party of the second part, his heirs, successors  
38 and assigns, of using sufficient water and gas from the premises necessary to the operation thereon, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time, machinery or fixtures placed on the premises by the said party of the second part.

To have and to hold the same, unto the said party of the second part, his heirs, successors and assigns, for the term of fifteen (15) years, and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Milliken, and the said terms of this lease shall run for Fifteen (15) years and as long thereafter as oil or gas is being produced as aforesaid.

The consideration named in a certain lease upon the aforesaid lands heretofore executed on the 24th day of August, 1909, by Thomas Gilcrease, to the said Grant R. McCullough, consisting of a bonus of Seventeen Thousand (\$17,000.00) Dollars, and a royalty of one-eighth ( $\frac{1}{8}$ ) of the oil to be produced from said land as a part of the consideration of this lease: And the said party of the first part, Lizzie Gilcrease, hereby adopts, ratifies and confirms the said  
lease from Thomas Gilcrease to the said Grant R. McCullough.

39 All conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

In witness whereof, we have hereunto set our hands this 4th day of September, 1909.

LIZZIE GILCREASE,

*Party of the First Part.*

GRANT R. MCCULLOUGH,

*Party of the Second Part.*



40 STATE OF OKLAHOMA,  
County of Tulsa, ss:

On this 4th day of September, 1909, before me, a Notary Public in and for said county and State, personally appeared Lizzie Gilcrease to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal, this 4th day of September, 1909.  
[SEAL.] C. W. GILLETT,  
Notary Public.

My Commission expires April 12, 1912.

Filed for record at Tulsa, Okla., Sep. 7, 1909, at 10:50 o'clock,  
A. M.

[SEAL.] H. C. WALKLEY,  
Register of Deeds.

STATE OF OKLAHOMA,  
County of Tulsa, ss:

I, H. C. Walkley, Register of Deeds, in and for the county and State above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office and recorded in Book 70, page 168.

Dated the 14 day of Feb. 1912.

[SEAL.] H. C. WALKLEY,  
Register of Deeds.

41

EXHIBIT "C."

*Contract.*

This contract, made and entered into on this 21st day of April, 1910, by and between Thomas Gilcrease, party of the first part and H. B. Martin, party of the second part.

Witnesseth: That this contract is made to take the place of and supersede a certain contract heretofore entered into on the 1st day of February, 1909, by and between Thomas Gilcrease and the firm of Hainer & Martin, and,

It is contracted and agreed that the said H. B. Martin will take charge of, and prosecute to the best of his skill and ability certain actions now pending as follows, to-wit:

A certain action in which the said Thomas Gilcrease is plaintiff and George C. Butte et al., are defendants now pending in the district court of Muskogee county, State of Oklahoma, and a certain other action in which the said Thomas Gilcrease is plaintiff and one William H. Millikin is defendant, now pending in the district court

of Tulsa county, State of Oklahoma. That in the said case of Gilcrease vs. Butte, that the compensation of the said H. B. Martin shall be 10% of whatever sum is recovered and collected in said cause whether by judgment of compromise, and that the said H. B. Martin, shall pay out of said commission his personal expenses in

attending to said cause and that the compensation of the said  
42 H. B. Martin for his services in the case of Gilcrease vs. Millikin, shall be 7 and  $\frac{1}{2}$  per cent of all sums of money collected from the said William H. Millikin and the other defendants in said cause, on account of the royalties for which said suit is prosecuted. And 7 and  $\frac{1}{2}$  per cent of all damages which may be recovered and collected in said cause.

It is further contracted and agreed that the said H. B. Martin shall represent the said Thomas Gilcrease in whatever litigation he may be a party for a period of one (1) year from the date of this contract, and that the compensation to be paid for such service shall be the reasonable value of the same to be agreed upon between the parties hereto at the time.

It is further agreed that a retainer fee of \$200.00 the receipt whereof is hereby acknowledged, shall be and is paid by the said party of the first part to the party of the second part, and that such retainer fee covers all services to be rendered, consultation, advice, examination and abstracts, and preparations of deeds and other papers and all other services of a legal nature which may be required by the said party of the first part of the said party of the second part during the term of this contract, except the prosecution and defense of suits in court.

Provided, however, that the said H. B. Martin is to charge no commission upon such royalties as are admitted and paid without  
contest by the said William H. Millikin and — Colley;  
43 accruing upon said oil and gas lease from this date.

In witness whereof, we have hereunto set our hands this 21st day of April, 1910.

THOMAS GILCREASE,  
*Party of the First Part.*  
H. B. MARTIN,  
*Party of the Second Part.*

44

## EXHIBIT "D."

*Contract.*

This indenture, made and entered into this 8th day of February, 1911, by and between Thomas Gilcrease, G. R. McCullough and H. B. Martin,

Witnesseth:

That for and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their respective heirs, administrators and assigns, shall have and

hold, in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:

The South One-half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North One-half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, in the county of Tulsa, and State of Oklahoma, as long as oil and gas, or either of them, are found upon said premises in paying quantities.

The said Thomas Gilcrease shall receive, as royalty for said leases premises, one-eighth ( $\frac{1}{8}$ ) of all the oil mined and saved upon said premises, delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil, upon demand of the said Thomas Gilcrease. And in addition to said royalty, the said Thomas Gilcrease, his heirs, executors and assigns, shall have and hold and undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said property; the said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half ( $\frac{1}{2}$ ) of the leasehold interest in said land; and the said H. B. Martin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said land.

And it is further contracted, covenanted and agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date as long as oil and gas is found thereon in paying quantities, and that after the payment of the royalty hereinbefore provided for to the said Thomas Gilcrease, that all of the balance of the proceeds of the oil produced from said leased premises, less necessary operating expenses, shall be applied to the payment of the cost of equipment of said lease until such equipment shall have been fully paid for out of said proceeds.

And it is further contracted, covenanted and agreed that the equipment now upon said leased premises, and hereafter to be placed upon said leased premises, shall be and remain the personal property of the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their heirs, executors, and assigns, in the proportion of the interests of said parties in said leasehold, as evidenced by this contract.

And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casings or any other portion of said equipment from any wells upon said leased premises, as long as oil is produced from said wells in paying quantities, but that when such wells shall become exhausted, and no longer produce oil in paying quantities, then such equipment may be removed by said parties hereto, their heirs, administrators and assigns.

And it is further covenanted and contracted that the expenses of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest of the said Thomas Gilcrease shall not be liable for any of the expense of the

equipment or operation of said lease, and shall be free from any expenses whatever.

In witness whereof, we have hereunto set our hands this 8th day of February, 1911.

THOMAS GILCREASE.  
G. R. McCULLOUGH.  
H. B. MARTIN.

STATE OF OKLAHOMA,

*County of Tulsa, ss:*

Before me, Benjamin C. Connor, a Notary Public in and for said County and State, on this 8th day of February, 1911, personally appeared Thomas Gilcrease, G. R. McCullough, and H. B. Martin, to me known to be the identical persons who executed the foregoing instrument, and acknowledged to me, each for himself that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[SEAL.]

BENJAMIN C. CONNOR.

My commission expires March 29, 1911.

47

EXHIBIT "E."

Know all men by these presents:

That for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations, the undersigned, H. B. Martin has bargained, sold, released and assigned and does by these presents bargain, sell, release and assign unto Thomas Gilcrease, of Tulsa, Oklahoma, his heirs, administrators and assigns, an undivided three-fourths ( $\frac{3}{4}$ ) of all the rights, title and interest derived, had and held by the said H. B. Martin in and to the oil and gas mining right upon the following described real property, to-wit:

The South One-half (S./2) of the Northwest Quarter (N. W./4) and the North One-half (N./2) of the Southwest Quarter (S. W./4) of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, in the county of Tulsa, and State of Oklahoma: under and by virtue of a certain contract of mining lease executed between the said Gilcrease, G. R. McCullough and the said H. B. Martin, on the 8th day of February, 1911, it being the intent of this assignment to convey to the said Thomas Gilcrease all rights, title, interest and privilege of the said H. B. Martin in the aforesaid contract of lease so far as the same affects the said undivided three-fourths interest of the said H. B. Martin.

It is further covenanted and contracted that the assignee, Thomas Gilcrease, assumes all obligations of the said H. B. Martin as to the said three-fourths interest, as to the expense of operating and equipping said leased premises.

48

In witness whereof, I have hereunto set my hand, this 11th day of December, 1911.

(Signed)

H. B. MARTIN.

STATE OF OKLAHOMA,

*County of Tulsa, ss:*

Before me, Guy L. Reed, a Notary Public within and for said county and state, on this 11th day of December, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the above and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

[SEAL.]

GUY L. REED,  
*Notary Public.*

My commission expires Aug. 21, 1912.

49

EXHIBIT "F."

*Assignment of Lease Contract.*

Know all men by these presents: That I, H. B. Martin, of the city of Tulsa, Oklahoma, for and in consideration of the sum of One (\$1.00) Dollar to me in hand paid the receipt whereof is hereby acknowledged, have bargained, sold, assigned, transferred and set over unto G. R. McCullough of Tulsa, Oklahoma, his heirs, executors, administrators and assigns, one-fourth ( $\frac{1}{4}$ ) of that part of the leasehold interest of the said H. B. Martin upon the following described real property, to-wit:

The South one-half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North One-half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, in the county of Tulsa, State of Oklahoma evidenced by a certain written indenture made and entered into on the 8th day of February, 1911, by and between the said H. B. Martin, one G. R. McCullough, and one, Thomas Gilcrease; which said indenture appears of record in the office of the Register of Deeds of the county of Tulsa, State of Oklahoma, at page 538 in Record number 99 of said office.

To have and to hold unto him, the said G. R. McCullough, his heirs, administrators and assigns, according to the terms and subject to the obligations of the said written indenture of February 8th, 1911, aforesaid.

In witness whereof, I have hereunto set my hand this 23rd day of March, 1911.

H. B. MARTIN.

50      STATE OF OKLAHOMA,  
            *County of Tulsa, ss:*

Before me, Roscoe Adams, a Notary Public in and for said county and State, on this 23 day of March, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

[SEAL.]

•      ROSCOE ADAMS,  
            *Notary Public.*

My commission expires June 6, 1914.

Filed for record in Tulsa county, Oklahoma, on Nov. 27, 1911 at 11 A. M.

[SEAL.]

H. C. WALKLEY,  
            *Register of Deeds.*

STATE OF OKLAHOMA,  
            *County of Tulsa, ss:*

I, H. C. Walkley, register of deeds, in and for the county and State above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office and recorded in Book 115, page 560.

Dated the 14 day of Feb. 1912.

[SEAL.]

H. C. WALKLEY,  
            *Register of Deeds.*

51-86      Endorsements: 3125. Thomas Gilcrease v. G. R. McCullough et al. Petition. District Court, State of Oklahoma, County of Tulsa. Filed Feb. 14, 1912 at 3:32 P. M. W. W. Stuckey, District Clerk. P. C. West and Biddison & Campbell, Attorneys for Plaintiff.

\*      \*      \*      \*      \*      \*      \*



87     STATE OF OKLAHOMA,  
          County of Tulsa, ss:

In the District Court.

No. —.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL  
BROWN, Defendants.

*Separate Answer of Defendant H. B. Martin.*

Comes now said defendant, H. B. Martin, leave of court first having been obtained, and for his separate answer to the petition of plaintiff filed in said cause, says and avers:

That he denies each and every allegation and averment in said petition contained except such as are hereinafter specifically admitted, explained or modified.

This answering defendant admits that the plaintiff is a citizen by blood of the Creek Nation or tribe of Indians, and has been enrolled on the tribal rolls of said nation made by the Dawes Commission to the Five Civilized Tribes, but defendant says that he is informed and believes and, therefore, avers the fact to be that said plaintiff was so enrolled as of the age of nine years on the 8th day of February 1899, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

And answering defendant further admits that as such citizen or member of the Creek Nation or tribe of Indians, plaintiff was entitled to and received an allotment of the lands of the said Creek Nation consisting of 160 acres, including surplus and homestead, lying, situate and being as alleged in plaintiff's petition, and that said lands were, on or about the 25th day of August, 1902, duly patented and conveyed to the plaintiff by the said Creek Nation.

And answering defendant admits that the defendant-, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown are each and all citizens of the State of Oklahoma and residents of the city of Tulsa and county of Tulsa in said State. That the defendant, G. R. McCullough is president of the First National Bank of Tulsa, Oklahoma, and A. E. Bradshaw is cashier of said bank; and that before the connection of the said G. R. McCullough and A. E. Bradshaw with said First National Bank, they were each stockholders and officers of the Bank of Oklahoma; and that the defendant, H. B. Martin, is an attorney at law and practicing at the city of Tulsa in the State of Oklahoma for the past four years, and has at various times and in divers cases represented, in his professional capacity, the Bank of Oklahoma and the First National Bank of Tulsa.



And answering defendant admits that the Bank of Oklahoma nationalized in the year 1911, that is, became a national bank.

89 And answering defendant admits that the aforesaid land allotted to the plaintiff is situated in the oil field which is commonly known as Glenn Pool, and is underlaid with large and valuable deposits of petroleum.

And answering defendant admits that in the month of September, 1906, the plaintiff, through his guardian, one William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Milliken, embracing the land hereinbefore described, and that Milliken proceeded to develop the same for oil and drilled upon said land between the fall of 1906 and the summer of 1909, some forty-nine wells. That in August, of 1909 about forty-two of said wells were producing oil, but whether said wells were producing at said time more than twenty-five thousand barrels of oil per month, as alleged in plaintiff's petition, this answering defendant is not informed and neither admits nor denies.

And answering defendant admits that before the 24th day of August, 1909, and on said date, this defendant was a member of the law firm of B. T. Hainer and H. B. Martin, engaged in the general practice of law under the firm name and style of Hainer & Martin, at the city of Tulsa aforesaid, and avers that said firm was on said date the regularly employed and acting counsel of the plaintiff in certain litigation in which the plaintiff was at that time involved, included in which litigation was a certain suit then pending in this court wherein the said plaintiff was plaintiff and one W. H. Milliken and W. E. Colley were defendants, which said suit was  
90 prosecuted to cancel the oil and gas mining lease theretofore executed by the guardian of plaintiff to the said Milliken and Colley upon the said land, and for an accounting of the royalties upon the profits of said lease.

And answering defendant admits that the plaintiff, on or about the 24th day of August, 1909, made, executed and delivered to the defendant, G. R. McCullough, the oil and gas mining lease exhibited in plaintiff's petition as Exhibit A, and that on or about the 18th day of September, 1908, the plaintiff had executed a warranty deed, conveying said lands to his mother, Lizzie Gilcrease, which deed was recorded in the office of the Register of Deeds in Record Book 33, at page 529, and that the said Lizzie Gilcrease, on or about September 4, 1909, executed to the defendant, G. R. McCullough, the oil and gas mining lease exhibited in plaintiff's petition as Exhibit B, and admits that on or about the 21st day of April, 1910, the plaintiff and this defendant executed the written contract exhibited in plaintiff's petition as Exhibit C.

This answering defendant admits that at the time of the execution of said contract, Exhibit C, this defendant was still a member of the law firm of Hainer & Martin, and that said contract was entered into by this defendant in his individual name, but avers that such was done at the request of the plaintiff with the knowledge and consent of this defendant's partner, B. T. Hainer, and because of the plaintiff's personal unfriendliness to this defendant's partner, this an-

91        answering defendant at the time agreeing with his said partner to compensate him for his interest in all of this defendant's time that should be occupied with the business and affairs of the plaintiff, which said agreement was at the time well known to the plaintiff and by him fully acquiesced in and consented to.

And answering defendant admits that on or about the 22nd day of October, 1910, the defendant, G. R. McCullough, sold and transferred to the plaintiff a one-fourth interest in the leases theretofore executed by the plaintiff and his mother Lizzie Gilcrease, to the said McCullough, and sold and transferred to this defendant a one-fourth interest in said leases. That previous to the 22nd day of October, 1910, the defendant, G. R. McCullough, had paid to the plaintiff the sum of \$4,000.00 of the original bonus by him agreed to be paid for the leases theretofore executed to the said McCullough by the said Gilcrease and his mother, Lizzie Gilcrease, according to the terms of the contract between the said plaintiff and the said McCullough. That there remained of the said original bonus so agreed to be paid, the sum of \$13,000.00, which was still unpaid by the said McCullough to the said Gilcrease, but avers that no part of said sum was at said time due.

And answering defendant admits that on or about the said 22nd day of October, 1910, the plaintiff surrendered to the defendant, G. R. McCullough, as part consideration of the purchase by the plaintiff of the sum of \$13,000.00, and paid to the said McCullough an additional sum of \$2,000.00, aggregating the sum of \$15,-  
92        000.00, the price agreed upon between the plaintiff and the defendant, McCullough as the purchase price of said interest.

And defendant admits that on the 8th day of February, 1911, the lease theretofore held upon said lands by the said William H. Milliken and his associated expired, and that the plaintiff, this defendant and the defendant G. R. McCullough, on said 8th day of February, 1911, made, executed and delivered, mutually, the written contract exhibited in plaintiff's petition as exhibit D; and that on the 11th day of December, 1911, this defendant made, executed and delivered to the plaintiff an assignment of three-fourths of the interest of this defendant in the said contract exhibited in plaintiff's petition as Exhibit D, by the written instrument exhibited in plaintiff's petition as Exhibit F; and this defendant admits that theretofore this defendant had executed to the defendant, G. R. McCullough, an assignment of one-fourth of the interest of this defendant in said contract, exhibited in plaintiff's petition as Exhibit D; but this answering defendant says that the said assignment to the said G. R. McCullough was executed and delivered by this defendant as security for the payment of certain indebtedness at the time due from this defendant to the defendant, G. R. McCullough, and to the First National Bank of Tulsa, Oklahoma, of which the said McCullough was at the time president, and that said assignment was not intended as a conveyance or transfer of said interest except as security, as aforesaid.

93        And answering defendant admits that on or about the 11th day of December, 1911, the plaintiff sold, assigned, endorsed

and transferred to this defendant a certain promissory note for the sum of \$3000.00 executed by one George W. Rose to the said plaintiff, and secured by real estate mortgage, and also a promissory note executed by S. C. Maxey and wife to the plaintiff for the sum of \$1500.00, and executed to this defendant deeds of conveyance for the following described real estate situated in Tulsa and Osage Counties, in the State of Oklahoma, to-wit:

The South 50 ft. of Lot 4, Block 183; East 37½ ft. of Lot 7, Block 1 of Bliss Addition; Lot 1, Block 2 of Brennan-Reed Addition; Lot 8 Block 1 of Brennan-Reed Addition; Lots 6, 7, 8, 9, 10 and 11 in Block 3 of North Moreland Addition to the city of Tulsa, Tulsa County, Oklahoma; and the Southeast Quarter of Section 25, Township 17 North, Range 12 East in Tulsa County, Oklahoma; the Northwest Quarter of Section 17, Township 20 North, Range 12 East, and the Southwest Quarter of the Southwest Quarter of Section 20, Township 20 North, Range 12 East, Osage County, Oklahoma.

And defendant further answering, says that the plaintiff, Thomas Gilcrease, was not a person without education, business judgment and ability, as alleged in his petition, at any of the times mentioned therein, but that on the contrary the said plaintiff is well educated and has been accustomed to transact business of an important nature for several years before any of the times mentioned in

94 plaintiff's petition. That plaintiff has heretofore conducted a store under his own management. That in February, 1909, the plaintiff, being a resident of the county of Wagoner and State of Oklahoma, duly filed his petition in the District Court of said county of Wagoner, State of Oklahoma, for the purpose of obtaining the decree and judgment of that court conferring upon the plaintiff his rights of majority and removing his disabilities of non-age; that due and legal service was had upon said application and that said court having jurisdiction of the plaintiff and of the subject-matter of his said petition, heard evidence as to the competency and business capacity of the plaintiff, and found and adjudged that the plaintiff was capable of transacting properly his own business and affairs, and rendered its judgment and decree granting plaintiff's said application and conferring upon him full right and authority to transact all business with the same effect as if he had reached the age of twenty-one years. That upon the rendering of said judgment and decree, the county court of Muskogee county, Oklahoma, in which a guardian had theretofore been appointed for the person and estate of the plaintiff, discharged said guardian and caused plaintiff's property to be delivered over into his own hands and that plaintiff thereupon, on or about the — day of February, 1909, assumed the control of all of his business affairs and has ever since conducted his business by his own efforts successfully.

95 And defendant says that prior to the execution of the oil and gas mining lease made by the plaintiff to the defendant, G. R. McCullough, on the 24th day of August, 1909, exhibited in plaintiff's petition as Exhibit A., this defendant had no acquaint-

ance of any character, no business or social relations with either the defendant A. E. Bradshaw or Al Brown. That this defendant was not consulted by the plaintiff as to the propriety or advisability of executing said lease and was not made aware of any intention on the part of the plaintiff to execute the same, and was not informed of any negotiations pending between the plaintiff and the defendants, McCullough, Bradshaw or Brown, until this defendant was directed by the plaintiff to write said lease on the 24th day of August, 1909, and informed that a contract had been made between the plaintiff and the defendant McCullough, for the execution of said lease; and defendant says that on said occasion he was not consulted by the plaintiff or by any one else as to the advisability of executing said lease. That the plaintiff did on said occasion ask the opinion of this defendant as to whether or not he could execute a valid oil and gas mining lease upon his lands, and defendant says that it was the opinion of this defendant that such a lease, if executed, would be valid, and that he so advised the plaintiff.

And defendant says that at the time and before the execution of said lease, he was not retained or employed by the plaintiff to advise him with reference to any of his business or transactions except as to the legal questions arising therein; that his acquaintance  
96 with the plaintiff at that time was very limited, and his business relations with him did not extend beyond legal services which he performed for the plaintiff when called upon so to do.

And defendant says further that he had no communication with the defendant, G. R. McCullough, with reference to the execution of said lease before the same was executed except on the occasion when said instrument of lease was written in this defendant's office, and that all communications between this defendant and the defendant McCullough on said occasion were in the immediate hearing and presence of the plaintiff.

And defendant further says that at the time of the execution of said lease exhibited as aforesaid, in plaintiff's petition as Exhibit A., this defendant had no intimate knowledge of the value of said property, no experience in the oil mining business and very little knowledge thereof, all of which facts were well known to the plaintiff. But defendant avers that said oil and gas mining lease last above referred to was not at the time of its execution of the market value of more than \$17,000.00 bonus. That the plaintiff had, before executing said lease to the defendant, McCullough, negotiated in the oil and gas mining lease market at and about the city of Tulsa for a long time endeavoring to effect a sale of said lease for the sum of \$10,000.00, but was unable to find a sale thereof at said price until he succeeded in selling the same to the defendants, McCullough and Bradshaw. That because of the risks and uncertainties and hazards  
of the oil and gas mining business and the long period of  
97 time it would be before the lessee could come into possession of said property, said lease at the time of its execution on the 24th day of August, 1909, was not worth to exceed \$10,000.00 bonus.

And defendant says that several days after the execution of said oil and gas mining lease as aforesaid, this defendant was advised by

the plaintiff and the defendant, McCullough, that the plaintiff had theretofore on the 18th day of September, 1909, conveyed by deed of general warranty, his title to the lands covered by said lease to his mother, Lizzie Gilcrease, and that said deed had been duly recorded in the office of the Register of Deeds of the county of Tulsa, Oklahoma. That this defendant was directed by the plaintiff to prepare an oil and gas mining lease running from the said Lizzie Gilcrease to the defendant McCullough, which this defendant did. That at the direction of the plaintiff said lease was submitted to the said Lizzie Gilcrease for her execution, and after consultation between the said Lizzie Gilcrease and the plaintiff with respect to the execution of said lease, the said Lizzie Gilcrease made, executed and delivered to the defendant, McCullough, on the 4th day of September, 1909, the oil and gas mining lease exhibited in plaintiff's petition as exhibit B. That said instrument was executed by the said Lizzie Gilcrease who is a woman of education and experience and business judgment, after full consultation and advice between her, her husband and the plaintiff, and with full knowledge of all the facts surrounding said transaction including the value and condition of said leased premises.

98 And defendant further says that the defendant, A. E. Bradshaw, was not appointed the guardian of the plaintiff by the procurement of this defendant as alleged in plaintiff's petition, but that said Bradshaw was selected by the plaintiff himself to be appointed as special guardian merely for the purpose of facilitating the collection of certain moneys due to the plaintiff and then in the hands of the U. S. Indian Superintendent at Muskogee, Oklahoma. That the only authority given the said Bradshaw by the order of his appointment in the county court of Tulsa county, Oklahoma, was to collect said funds, and that immediately upon the collection of said funds, they were paid over upon the request of the plaintiff and the order of the county court aforesaid to the plaintiff in person or according to his directions and order.

And answering defendant says that the said pretended appointment of the said A. E. Bradshaw as guardian aforesaid was wholly without jurisdiction for the reason that theretofore in a proceeding pending in the county court of Muskogee county, Oklahoma, the court at the time having jurisdiction of the plaintiff and his estate, a guardian had been duly and regularly appointed for the person and estate of plaintiff, and that said proceedings and cause had not been transferred from the said county court of Muskogee county but remained therein, and that the county court of Tulsa county had no jurisdiction in the premises. That the only purpose and effect of the pretended appointment of the said A. E. Bradshaw as guardian as aforesaid was to induce the U. S. Indian Superintendent to pay over the funds in his hands to which the plaintiff was entitled so that the plaintiff might receive and enjoy the same. And defendant says that all the acts on his part performed in connection with said guardianship were performed in good faith and in behalf of the plaintiff for the purpose of collecting the funds belonging to the plaintiff for his benefit. That this



defendant's law firm received compensation for said services in accordance with the contract and agreements made with the plaintiff for the reasonable value of the services rendered in his behalf.

And the defendant says that after the execution of the leases exhibited in plaintiff's petition as Exhibits A and B aforesaid, about the 10th day of July, 1910, the Supreme Court of the State of Oklahoma, in a certain cause pending in said court, entitled Jefferson vs. Winkler, decided, in substance, that a married minor Creek Indian allottee could not, under the acts of Congress in force at the time and the laws of the State of Oklahoma, execute a valid alienation of the title to his allotment. Defendant says that the rule of law laid down and declared in said opinion was contrary to what this defendant had theretofore understood the law to be. That as soon as this defendant learned of said decision he advised the plaintiff of the same and procured a copy of said opinion which the plaintiff read, and this defendant thereupon advised the plaintiff of what this defendant believed the effect of said opinion had upon the validity of the leases theretofore executed to the defendant, McCullough, and that it was probable, in the light of said opinion, that said leases might be avoided. And defendant says that it is

not true but false that the plaintiff demanded of the defendant McCullough the release of the contracts and agreements theretofore entered into by the plaintiff and said defendant, but that, on the contrary, the plaintiff when advised of the situation of said contracts with reference to the law as it had been declared by the Supreme Court of Oklahoma, reaffirmed said contracts, stating that he was perfectly satisfied with them; that he had been paid all said lease was worth at the time of his previous transactions with the defendant McCullough; that he desired to carry out his said contracts in good faith and did not wish to adopt a course of repudiation or dishonesty. And defendant says that pursuant to said purpose so declared on the part of said plaintiff, plaintiff began negotiations with the defendant, McCullough, to purchase an interest in said contract and requested this defendant to join him in said purchase. And defendant says that he at the time advised the plaintiff that he did not have sufficient available means to purchase said interest and that he did not wish to do so. That the plaintiff insisted that this defendant purchase an interest from the defendant, McCullough, and offered to assist this defendant to obtain sufficient funds for such purpose; and defendant says that upon the urgent request of the plaintiff, this defendant consented to and did purchase from the defendant McCullough a one-fourth interest in the rights of the said defendant McCullough under the leases theretofore executed by the plaintiff and the plaintiff's mother, Lizzie Gilcrease, to the said McCullough, for the agreed consideration of \$15,000.00. Defendant says that at the same time, or about

the same time, this defendant purchased said interest, the plaintiff also purchased from the defendant, McCullough, a one-fourth interest in the rights of the defendant, McCullough, under said leases, for the consideration of \$15,000.00. That the plaintiff paid for said interest by surrendering to the defendant,



McCullough, the agreement on his part to pay to the said plaintiff \$13,000.00 of the original bonus agreed to be paid by the defendant, McCullough, to the plaintiff for the execution of said leases, and by paying to the said McCullough \$2,000.00 in cash. At the time of said transaction, this defendant was obliged to borrow and did borrow from the defendant, McCullough, and others, a large part of the funds with which said purchase was made on the part of this defendant. That all of said facts were well known to the plaintiff at the time and were made and done with his full knowledge, consent and concurrence, and, indeed, at his special instance and request.

And defendant says that in none of the transaction- aforesaid, or any of the matters entering into the same, was there any deception, fraud or conspiracy practiced upon or against the said plaintiff by this defendant or any of his co-defendants, but that all of said transactions were conducted in good faith, fairly and with the full knowledge of the plaintiff therein.

Defendant further says that on the 8th day of February, 1911, the lease upon the plaintiff's said lands under which the said William M. Milliken and his associates had mined and operated said lands for oil, expired; that under the terms of said lease, 102 the said Milliken was entitled to take away the derricks, lead lines, tubing, rods, engines, powers and all the equipment for mining purposes then upon the said premises, except the casing in the wells, and was entitled to remove the casing from such wells as had ceased to produce oil in paying quantities. That under the terms of the said lease, the said Milliken had sixty days from the expiration thereof in which to remove said mining equipment. That it required an investment and expenditure, in order to purchase proper equipment to continue the operation upon said premises of mining oil, of a large sum of money, to-wit: about \$40,000.00. That it was also necessary to devise some means of preventing an interruption of the operations of said wells for the reason that if they were permitted to stand idle for any considerable period, the water would flow in upon the oil *said* in said wells and totally destroy their productiveness and value. And defendant says that the plaintiff had no personal experience in oil and gas mining operations and no money or credit with which to provide the necessary equipment of said premises for oil and gas mining purposes and preserve the same from being injured and destroyed for want of operation. The plaintiff was desirous of engaging in the operation of the open mines upon said land and did not wish to sell the same or sell the leasehold interest therein. The plaintiff thereupon proposed on or about the 8th day of February, 1911, to this defendant and the defendants, G. R. McCullough, and A. E. Bradshaw, to enter into a contract of partnership for the purpose of equipping 103 said premises for oil and gas mining purposes and operating the same so long as oil and gas or either of them might be found upon said premises. It was thereupon agreed between the plaintiff and this defendant and the defendants McCullough and Bradshaw, that said parties, their heirs, representatives or assigns,

would purchase the necessary equipment aforesaid and provide the necessary means for operating the open mines upon said premises and continue the operation thereon so long as oil and gas or either of them should be found in paying quantities, sharing the profits and losses of said enterprise. That the plaintiff should receive as royalty free from all expenses, for the use of said mines, one-eighth of all the oil and gas produced from said mines and that the shares of said parties in said business and its profits should be: G. R. McCullough, one-half; the plaintiff one-fourth; and this defendant the remaining one-fourth. Pursuant to said understanding and arrangement so entered into, the plaintiff and the defendant, G. R. McCullough and this defendant, for the mutual considerations of giving their credit, money, attention and time to the conduct of said business, made, executed and mutually delivered their certain contract of partnership in writing, a copy of which is exhibited in plaintiff's petition as Exhibit D.

Defendant says that it was understood at the time between the plaintiff and the defendant, McCullough, and this defendant, that the defendant, Bradshaw, would receive an assignment of a part of the interest of the defendant, McCullough, in said partnership contract, but that this defendant was not informed as to what share

the said Bradshaw would receive. It was, however, agreed  
104 between the parties to said contract referred to as Exhibit

D., that the said Bradshaw would participate in the conduct and operation of said mining business. And defendant says that the plaintiff, at the time of the execution of said partnership contract, was twenty-one years of age and of more than average intelligence, and of at least three years active successful experience in business. That the plaintiff was fully advised of the value of his said lands and the mines thereon, of the necessary cost of equipping the same for operation, and of the probable profits of such operation, and that the plaintiff was also aware of all laws and statutes and decisions of the courts bearing upon his right, title and interest in said lands and his contracts in relation thereto.

And defendant says that pursuant to the terms of the aforesaid contract of partnership, this defendant, the defendant McCullough and the plaintiff purchased of divers persons equipment consisting of miscellaneous equipment in the sum of \$23,387.94. buildings and houses for workmen at a cost of \$900.13; rigs and derricks for oil wells, \$4084.21; pipelines \$5629.05; tanks \$2490.00; tools \$29.35; supplies \$456.57; pumping \$2897.22; supervision \$2295.96; pulling and cleaning wells \$2707.83; general labor \$5153.48; general expense \$365.18; freight and express \$249.64; telegrams expense \$81.60; team and livery hire \$3106.45; use of tools and repairs \$626.57; an aggregate expense of \$—. That they entered upon the possession of said premises and proceeds in the mining operation thereon; that owing to the diligent, careful and competent care and

attention to said mines given by the plaintiff and the said  
105 defendants, they were greatly improved in their production and value; and that the productive capacity of said mines was increased from about 290 barrels per day to more than 500 barrels

per day; that the value of said property was thereby greatly enhanced so that said mines with the equipment provided as aforesaid for the same, are now more than quadrupled in value.

And the defendant says that he is informed and believes and, therefore, avers the fact to be, that the defendant, McCullough, has agreed to transfer to the defendant, A. E. Bradshaw, three-eighths of his interest in said contract of partnership, and to the defendant, Brown, two-eighths of the same; but that no actual transfer of said interests has as yet been made.

And defendant says that the conduct of said business has produced large profits of which the plaintiff has from time to time, both before and since the commencement of this action, taken his share under the terms of said partnership contract. That the plaintiff has received from time to time all the benefits of said contract accruing to him with full and complete knowledge of all the facts relating thereto, and defendant says that plaintiff ought to be and is, in equity, estopped to deny the validity of said partnership contract for any cause whatever.

And defendant says that on or about the 27th day of June, 1911, when it was ascertained that the mining interests acquired by this defendant were about to become profitable, this defendant's partner, Judge B. T. Hainer, called upon this defendant for compensation according to the terms of the contract theretofore made between this defendant and his said partner for the time taken out of the partnership business by this defendant in attention to the mining interests in which he was engaged with the plaintiff, including the interest hereinbefore described.

Defendant says that he informed the plaintiff of the said demand and discussed with the plaintiff the matter as to what would be reasonable compensation under the circumstances, and advised the plaintiff that this defendant's said partner claimed an interest in the mining interests acquired by this defendant; that it was after full consideration and discussion between the plaintiff and this defendant that Judge Hainer and this defendant finally agreed that \$12,500.00 would be a fair compensation for this defendant to pay to his partner upon said account. That pursuant to said understanding, it was agreed, with the knowledge and consent of the plaintiff, between this defendant and his partner, Judge Hainer, that this defendant would pay on said account the sum of \$12,500.00; and defendant says that pursuant to said agreement and understanding and with the full knowledge, consent and concurrence of the plaintiff, this defendant did pay to H. T. Hainer, on or about the 27th day of June, 1911, the full sum of \$12,500.00 in satisfaction and discharge of said claim and account.

And defendant says that thereafter, on or about the 11th day of December, 1911, the plaintiff proposed to this defendant a settlement of the accounts and transactions between the plaintiff and this defendant, and proposed to this defendant that he purchase from this defendant three-fourths of this defendant's interest in said partnership contract. And defendant says that at said time the plaintiff was indebted to this defendant upon several

accounts for services as plaintiff's attorney, for moneys advanced to plaintiff and for him at his request, in about the sum of \$5,000.00, the exact amount of which indebtedness this defendant does not know and cannot now specifically state. That this defendant was indebted to the plaintiff upon various accounts the exact amount of which this defendant does not know and cannot definitely state, in about the sum of \$6,500.00. That the plaintiff proposed to this defendant in settlement of all the open accounts and mutual indebtedness existing between them, to take a transfer from this defendant of three-fourths of his interest in the aforesaid partnership contract, one-half of this defendant's holdings in the capital stock of the Rogan Oil Company, and one-half of this defendant's holdings in the capital stock of the Waterside Oil & Gas Company, a corporation, and convey to this defendant the following described real property, to-wit:

The South 50 ft. of Lot 4, Block 183; East 37½ ft. of Lot 7 in block 1 of Bliss Addition; Lot 1, Block 2 of Brennan-Reed Addition; Lot 8 Block 1 of Brennan-Reed Addition; Lots 6, 7, 8, 9, 10 and 11 in block 3 of North Moreland Addition to the city of Tulsa, Tulsa county Oklahoma; and the Southeast Quarter of Section 25, Township 17 North, Range 12 East in Tulsa county, Oklahoma; the Northwest Quarter of Section 17, Township 20 North, Range 12 East; and the Southwest Quarter of the Southwest Quarter of Section 20, Township 20 North, Range 12 East, Osage county, Oklahoma;

and to endorse to this defendant the note of George W. Rose for \$3,000.00 hereinbefore described, and the note of S. C. Maxey for \$1,500.00 hereinbefore described, and to turn over to this defendant a one-half interest in a certain horse called Nick, which at the time belonged to the plaintiff and this defendant as partners, one milk cow, and certain hogs the number of which was unknown but which were owned and kept by the plaintiff upon his wife's farm in Osage county, and a certain electric automobile.

After consideration of this proposition made by the plaintiff to this defendant, this defendant accepted the same, and pursuant to said contract, all of the aforesaid property was conveyed and transferred, the plaintiff and this defendant mutually executing receipts against the indebtedness of each to the other.

And defendant says that the aforesaid stock in the Rogan Oil Company, at the time of the transfer by this defendant to the plaintiff was and is of the reasonable value of \$5,000.00, and the capital stock of the Waterside Oil & Gas Company, transferred in said settlement by this defendant to the plaintiff, was and is of the reasonable value of \$1,000.00. That the other property transferred

109 and delivered to the said plaintiff by this defendant in said settlement was of the aggregate and reasonable value of about \$35,000.00. That all of the property received in said settlement by this defendant from the plaintiff, including the credits received therein, did not exceed the value of \$30,000.00.

That all of the aforesaid transactions had between this defendant and the plaintiff have resulted in a loss to this defendant instead of a profit.

And the defendant, for further answer says, and avers, that on the 12th day of February, 1912, after the plaintiff had caused to be dictated his petition in this cause, and was about to file the same in this court, the plaintiff brought to this defendant a Mr. W. A. Branson and a Mr. Henry Payne, who were in the business of selling and planting trees and shrub-ery, and stated to Mr. Branson and Mr. Payne in the presence of this defendant, that this defendant owned the property where the plaintiff then and now resides, a portion of the property conveyed by the plaintiff to the defendant on the 11th day of December, 1911, as aforesaid, and advised this defendant to contract with the said Branson and Payne to have some trees transplanted upon said property, and this defendant says that acting upon said advice, he contracted with the said Branson and Payne to transplant said trees, at an expense of \$55.00, which work was duly performed by the said Branson and Payne and for which this defendant was obliged to and did pay the sum of \$55.00. And defendant says that the plaintiff ought to be and is estopped in equity by his said conduct, from denying the plaintiff's title in and to said property.

And defendant says that with the knowledge and consent of the plaintiff he has paid the taxes due and becoming due on all of said real property conveyed by the plaintiff to this defendant as aforesaid.

And the defendant says that the plaintiff has ever since the 11th day of December, 1911, taken, appropriated and enjoyed all the profits arising from the oil interests conveyed by this defendant to the plaintiff at said time, and continues to appropriate and enjoy said profits, to the present time, and that the plaintiff has received therefrom a large sum of money, to-wit: more than \$5,000.00, and that the plaintiff ought to be and is estopped in equity to deny the validity of said settlement.

Wherefore, the premises considered, this defendant prays that the plaintiff take nothing by this action, that this defendant recover his costs and all other and further relief to which he may be in equity and good conscience entitled.

STUART, CRUCE & GILBERT,

MARTIN, BUSH & MURRY,

*Attorneys for Defendant H. B. Martin.*

111      Endorsements: No. 3125. District Court. Thomas Gilcrease vs. G. R. McCullough et al. Separate Answer of H. B. Martin. District Court State of Oklahoma County of Tulsa. Filed Jun- 15, 1912. W. W. Stuckey, District Clerk.

112      And thereupon on the same day, to-wit, the 15th day of June, 1912, there was filed the Separate Answer of the defendant G. R. McCullough.

Which said separate answer is in the words and figures following, to-wit:

113 STATE OF OKLAHOMA,  
County of Tulsa, ss:

In the District Court.

No. —.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL  
BROWN, Defendants.

*Separate Answer of Defendant G. R. McCullough.*

Comes now said defendant, G. R. McCullough, leave of court first having been obtained, and for his separate answer to the petition of plaintiff filed in said cause, says and avers:

That he denies each and every allegation and averment in said petition contained except such as are hereinafter specifically admitted, explained or modified.

This answering defendant admits that the plaintiff is a citizen by blood of the Creek Nation or tribe of Indians, and has been enrolled on the tribal rolls of said nation made by the Dawes Commission to the Five Civilized Tribes, but defendant says that he  
114 is informed and believes and, therefore avers the facts to be that said plaintiff was so enrolled as of the age of nine years on the 8th day of February, 1899, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

And answering defendant further admits that as such citizen or member of the Creek Nation or tribe of Indians, plaintiff was entitled to and received an allotment of the lands of the said Creek Nation consisting of 160 acres, including surplus and homestead, lying, situate and being as alleged in plaintiff's petition, and that said lands were, on or about the 25th of August, 1902, duly patented and conveyed to the plaintiff by the said Creek Nation.

And answering defendant admits that the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, are each and all citizens of the State of Oklahoma and residents of the city of Tulsa and county of Tulsa in said State. That this defendant is president of the First National Bank of Tulsa, Oklahoma, and A. E. Bradshaw is cashier of said bank; and that before the connection of this defendant and A. E. Bradshaw with said First National Bank, they were each stockholders and officers of the Bank of Oklahoma; and that the defendant, H. B. Martin, is an attorney at law and practicing at the city of Tulsa in the State of Oklahoma for the past four years, and has at various times and in divers cases



represented in his professional capacity, the Bank of Oklahoma and the First National Bank of Tulsa.

115 And answering defendant admits that the Bank of Oklahoma nationalized in the year 1911, that is, became a national bank.

And answering defendant admits that the aforesaid land allotted to the plaintiff is situated in the oil field which is commonly known as Glenn Pool, and is underlaid with large and valuable deposits of petroleum.

And answering defendant admits that in the month of September, 1906, the plaintiff, through his guardian, one William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Millikin, embracing the land hereinbefore described, and that Millikin proceeded to develop the same for oil and drilled upon said land between the fall of 1906 and the summer of 1909, some forty-nine wells. That in August of 1909 about forty-two of said wells were producing oil but whether said wells were producing at said time more than twenty-five thousand barrels of oil per month, as alleged in plaintiff's petition, this answering defendant is not informed and neither admits nor denies.

And answering defendants admit that the plaintiff, on or about the 24th day of August, 1909, made, executed and delivered to this defendant the oil and gas mining lease exhibited in plaintiff's petition as Exhibit A., and that on or about the 18th day of September, 1908, the plaintiff had executed a warranty deed, conveying said

116 lands to his mother, Lizzie Gilcrease, which deed was recorded in the office of the Register of Deeds in Record Book 33 at Page 529, and that the said Lizzie Gilcrease, on or about September 4, 1909, executed to this defendant, G. R. McCullough, the oil and gas mining lease exhibited in plaintiff's petition as Exhibit B, and admits that on or about the 21st day of April, 1910, the plaintiff and the defendant, H. B. Martin, executed the written contract exhibited in plaintiff's petition as Exhibit C.

And answering defendant admits that on or about the 22nd day of October, 1910, this defendant sold and transferred to the plaintiff a one-fourth interest in the leases theretofore executed by the plaintiff and his mother, Lizzie Gilcrease, to the said defendant, and sold and transferred to the defendant, H. B. Martin, a one-fourth interest in said leases. That previous to the said 22nd day of October, 1910, this defendant had paid to the plaintiff the sum of \$4,000.00 of the original bonus by him agreed to be paid for the leases theretofore executed to this defendant by the said Gilcrease and his mother, Lizzie Gilcrease, according to the terms of the contract between the said plaintiff and this defendant. That there remained of the said original bonus so agreed to be paid, the sum of \$13,000.00, which was still unpaid by this defendant to the said Gilcrease, but avers that no part of said sum was at said time due.

And answering defendant admits that on or about the said 22nd day of October, 1910, the plaintiff surrendered to this defendant, as part consideration of the purchase by the plaintiff on said date of

117 a one-fourth interest in said leases, the said obligation of this defendant to the plaintiff of the sum of \$13,000.00, and paid to this defendant an additional sum of \$2,000.00, aggregating the sum of \$15,000.00, the price agreed upon between the plaintiff and this defendant as the purchase price of said interest.

And defendant admits that on the 8th day of February, 1911, the lease theretofore held upon said lands by the said William H. Milliken and his associates expired, and that the plaintiff, this defendant and the defendant, H. B. Martin, on said 8th day of February, 1911, made, executed and delivered, mutually, the written contract exhibited in plaintiff's petition as Exhibit D; and that on the 11th day of December, 1911, the defendant, H. B. Martin, made, executed and delivered to the plaintiff an assignment of three-fourths of the interest of said defendant under the said contract exhibited in plaintiff's petition as Exhibit D, by the written instrument exhibited in plaintiff's petition as Exhibit F; and this defendant admits that theretofore the defendant H. B. Martin had executed to this defendant an assignment of one-fourth of the interest of said defendant Martin in said contract, exhibited in plaintiff's petition as Exhibit D; but this answering defendant says that the said assignment to this defendant was executed and delivered by the said defendant, H. B. Martin, as security for the payment of certain indebtedness at the time due from said defendant H. B. Martin to this defendant and to the First National Bank of Tulsa, Oklahoma of which this defendant was at the time president, and that said assignment was not  
118 intended as a conveyance or transfer of said interest except as security, as aforesaid.

And defendant, further answering, says that the plaintiff, Thomas Gilcrease, was not a person without education business judgment and ability, as alleged in his petition, at any of the times mentioned therein, but that on the contrary the said plaintiff is well educated and has been accustomed to transact business of an important nature for several years before any of the times mentioned in plaintiff's petition. That plaintiff had theretofore conducted a store under his own management. That in February, 1909, the plaintiff, being a resident of the county of Wagoner, State of Oklahoma, for the purpose of obtaining the decree and judgment of that court, conferring upon the plaintiff his rights of majority and removing his disabilities of non-age; that due and legal service was had upon said application and that said court having jurisdiction of the plaintiff and of the subject matter of his said petition, heard evidence as to the competency and business capacity of the plaintiff, and found and adjudged that the plaintiff was capable of transacting properly his own business and affairs, and rendered its judgment and decree granting plaintiff's said application and conferring upon him full right and authority to transact all business with the same effect as if he had reached the age of twenty-one years. That upon the rendering of said judgment and decree, the county court of Muskogee county, Oklahoma, in which a guardian had theretofore been appointed for the person and estate of the plaintiff, discharged said guard-

119     ian and caused plaintiff's property to be delivered over into his own hands and that plaintiff thereupon, on or about the — day of February, 1909, assumed the control of all of his business affairs and has ever since conducted his business by his own efforts successfully.

And this defendant especially denies that prior to the execution of the oil and gas mining lease made by plaintiff to this defendant on the 24th day of August, 1909, exhibited in plaintiff's petition as Exhibit A., or at any other time, that any conspiracy, confederation, understanding or agreement of any kind was made between this defendant and his co-defendant, H. B. Martin, on the subject of said transaction and defendant says that he did not consult with or advise with the defendant, H. B. Martin, at any time in said transaction. That he is informed and believes, and therefore, avers the fact to be, that the defendant, H. B. Martin, had no knowledge of the negotiations pending between the plaintiff and this defendant and the defendant A. E. Bradshaw, pertaining to the making of said contract, until the defendant, H. B. Martin, was called upon by the plaintiff and this defendant as counsel for the plaintiff to write the contract already heretofore agreed upon between the plaintiff, this defendant and the defendant A. E. Bradshaw. And this defendant denies that at any of the times mentioned in plaintiff's petition, the plaintiff was in any wise deceived, influenced or overreached by this defendant or any of his co-defendants with reference to any of the transactions complained of in plaintiff's  
120     petition; but defendant, says and avers that all of said transactions were conducted on the part of the plaintiff of his own free will and choice and upon his own initiative, with full knowledge on the part of plaintiff of all the facts and circumstances of said transactions and all of them, and especially with full knowledge as to the value of the interests involved in said transactions, the condition of the property therein involved and the law governing the plaintiff's rights in dealing therewith.

And defendant further says that at the time of the execution of said lease exhibited as aforesaid in plaintiff's petition as Exhibit A., this defendant had no intimate knowledge of the value of said property, no experience in the oil mining business and very little knowledge thereof, all of which facts were well known to the plaintiff. But defendant avers that said oil and gas mining lease last above referred to was not at the time of its execution of the market value of more than \$17,000.00, bonus. That the plaintiff had, before executing said lease to this defendant, negotiated in the oil and gas mining lease market at and about the city of Tulsa for a long time endeavoring to effect a sale of said land for the sum of \$10,000.00, but was unable to find a sale thereof at said price until he succeeded in selling the same to the defendant, Bradshaw, and this defendant. That because of the risks and uncertainties and hazards of the oil and gas mining business and the long period of time it would be before the lessee could come into possession of said property, said  
lease at the time of its execution on the 24th day of August,

121 1909, was not worth to exceed \$10,000.00 bonus.

This defendant says that several days after the execution of said oil and gas mining lease, as aforesaid, upon an examination of the records of the register of deeds of Tulsa county, Oklahoma, this defendant learned that the plaintiff had theretofore on the 18th day of September, 1909, conveyed by deed of general warranty, his title to the lands covered by said lease, to his mother Lizzie Gilcrease, and that said deed had been duly recorded in the office of the register of deeds of Tulsa county, Oklahoma. That this defendant thereupon notified the defendant H. B. Martin, as plaintiff's attorney, and the plaintiff himself, of said facts and demanded that the defect, or apparent defect, in the plaintiff's title to said lands be cured by obtaining some conveyance from the said Lizzie Gilcrease, or that the \$2,000.00 theretofore paid by this defendant on account of the execution of said lease and the obligation of this defendant to pay to the plaintiff an additional \$15,000.00 be delivered back and surrendered. That the plaintiff thereupon advised this defendant that he could and would procure from his mother, Lizzie Gilcrease, a sufficient conveyance to cure the said defect in plaintiff's title. And this defendant says that thereafter on or about the 4th day of September, 1909, the plaintiff caused the said Lizzie Gilcrease to execute and deliver to this defendant the oil and gas mining lease exhibited in plaintiff's petition as Exhibit B. That the said instrument was executed by the said Lizzie Gilcrease, who was a woman of

122 education and experience and business judgment, after full consultation and advice between her, her husband and the plaintiff, and with full knowledge of all of the facts surrounding said transaction, including the value and condition of said leased premises.

And defendant further says that the defendant, A. E. Bradshaw, was not appointed the guardian of the plaintiff by the procurement of the defendant, H. B. Martin, as alleged in plaintiff's petition, but that said Bradshaw was selected by the plaintiff himself to be appointed as special guardian merely for the purpose of facilitating the collection of certain moneys due to the plaintiff and then in the hands of the U. S. Indian Superintendent at Muskogee, Oklahoma. That the only authority given the said Bradshaw by the order of his appointment in the county court of Tulsa county, Oklahoma, was to collect said funds, and that immediately upon the collection of said funds, they were paid over upon the request of the plaintiff and the order of the county court aforesaid to the plaintiff in person or according to his directions and order.

And answering defendant says that the said pretended appointment of the said A. D. Bradshaw as guardian aforesaid was wholly without jurisdiction for the reason that theretofore in a proceeding pending in the county court of Muskogee county, Oklahoma, the court at the time having jurisdiction of the plaintiff, and his estate, a guardian had been duly and regularly appointed for the person and estate of plaintiff, and that said proceedings and cause had not been transferred from the said county court of Muskogee

123 county but remained therein, and that the county court of

Tulsa county had no jurisdiction in the premises. That the only purpose and effect of the pretended appointment of the said A. E. Bradshaw as guardian as aforesaid was to induce the U. S. Indian Superintendent to pay over the funds in his hands to which the plaintiff was entitled so that the plaintiff might receive and enjoy the same.

And this defendant says that at the time of the execution of said instruments, exhibited in plaintiff's petition as exhibits A and B., this defendant had taken advice from his counsel as to the validity of said leases, and had been theretofore advised that the same were valid, and this defendant, in good faith, believes that the plaintiff had full and competent power to execute said instruments of lease upon his part; that the plaintiff had full knowledge as to the value of said lease, and that the bonus of \$17,000.00 paid and agreed to be paid to the plaintiff by this defendant was a fair and adequate consideration for said lease. That this defendant had no knowledge or suspicion of any defect in the validity of the said oil and gas mining leases theretofore executed by plaintiff and his mother to this defendant until about the month of July, 1910, when the defendant learned of the decision of the Supreme Court of the State of Oklahoma in the case of Jefferson vs. Winkler. And this answering defendant avers that about the time when said decision of the Supreme Court of Oklahoma in the case of Jefferson vs. Winkler aforesaid was handed down and promulgated, that the plaintiff was advised of said decision and fully advised as to its effect upon the validity of the contract theretofore entered into between the plaintiff and this defendant. That thereafter the plaintiff informed this defendant that he knew of said decision; that he was aware and had been advised by his counsel and others that the leases theretofore executed by him and his mother to this defendant might be by him avoided, but that he was satisfied with the fairness of said contract; that he did not wish to repudiate said contracts or pursue a course of dishonesty toward this defendant; that it was his intention to carry out said contract according to its terms. And this defendant says that he thereafter continued to pay to the plaintiff the payments falling due upon his said contract with the plaintiff as the same fell due, and relied upon the representations of the plaintiff that he intended to carry out said contract according to its terms, honestly and in good faith.

And defendant says that pursuant to said purpose so declared on the part of said plaintiff, the plaintiff began negotiations with this defendant to purchase an interest in said contract, and defendant says that thereafter, about the 22nd day of October, 1910, the plaintiff proposed to this defendant to purchase a one-fourth interest in this defendant's rights under the said contracts exhibited in plaintiff's petition as Exhibits A and B., for a consideration of \$15,000.00. That this defendant agreed to said offer and proposition made by the plaintiff, and sold and assigned to the plaintiff on or about the said 22nd day of October, 1910, a one-fourth interest in said contracts for the agreed consideration of \$15,000.00. That at the time of said transaction, this defendant had paid to the plaintiff the



sum of \$4,000.00 if the \$17,000.00 bonus agreed to be paid by this defendant to the plaintiff for said lease, and that \$13,000.00 of said bonus was not yet due and remained unpaid. And defendant says that the plaintiff, in consideration of said assignment of said one-fourth interest by this defendant to him, paid to this defendant the sum of \$2,000.00 and surrendered the obligation of this defendant for said \$13,000.00. And defendant says that at the special instance and request of the plaintiff, he, at or about the same time, sold and assigned to the defendant, H. B. Martin, a one-fourth interest in this defendant's rights under said contract for the agreed consideration of \$15,000.00. That it was understood and agreed between this defendant, the plaintiff and the defendant H. B. Martin at the time, that the defendant, H. B. Martin, did not have available sufficient funds to pay the full purchase price of said assignment and that it would be necessary for this defendant to extend credit to the said defendant, Martin, for a part of said consideration, and to assist the defendant Martin in borrowing money to aid him in paying said consideration. That this defendant did accept the note of the defendant, H. B. Martin, for \$6,000.00, as a part of said consideration, and assist the said H. B. Martin to borrow other moneys and funds with which to enable him to pay the purchase price of said assignment. That all of these facts were well known to the plaintiff at the time and by him fully concurred in and consented to.

126 And defendant says that in none of the transactions aforesaid, or any of the matters entering into the same, was there any deception, fraud or conspiracy practiced upon or against the said plaintiff by this defendant or any of his co-defendants, but that all of said transactions were conducted in good faith, fairly and with the full knowledge of the plaintiff therein.

Defendant further says that on the 8th day of February, 1911, the lease upon the plaintiff's said lands under which the said William H. Milliken and his associates had mined and operated said lands for oil, expired; that under the terms of said lease, the said Milliken was entitled to take away the derricks, lead lines, tubing, rods, engines, powers and all the equipment for mining purposes then upon the said premises except the casing in the wells, and was entitled to remove the casing from such wells as had ceased to produce oil in paying quantities. That under the terms of the said lease, the said Milliken had sixty days from the expiration thereof in which to remove said mining equipment. That it required an investment and expenditure, in order to purchase proper equipment to continue the operations upon said premises of mining oil of a large sum of money, to-wit about \$40,000.00. That it was also necessary to devise some means of preventing an interruption of the operations of said wells for the reason that if they were permitted to stand idle for any considerable period, the water would flow in upon the oil sand in said wells and totally destroy their productiveness and value. And

127 defendant says that the plaintiffs had no personal experience in oil and gas mining operations, and no money or credit with which to provide the necessary equipment of said premises for oil and gas mining purposes and preserve the same from being in-



jured and destroyed for want of operation. The plaintiff was desirous of engaging in the operation of the open mines upon said land and did not wish to sell the same or sell the leasehold interest therein. The plaintiff thereupon proposed on or about the 8th day of February, 1911, to this defendant and the defendants, H. B. Martin and A. E. Bradshaw, to enter into a contract of partnership for the purpose of equipping said premises for oil and gas mining purposes and operating the same so long as oil and gas, or either of them, might be found upon said premises. It was thereupon agreed between the plaintiff and this defendant and the defendants, Martin and Bradshaw, that said parties, their heirs, representatives and assigns would purchase the necessary equipment aforesaid and provide the necessary means for operating the open mines upon said premises and continue the operation thereon so long as oil and gas or either of them should be found in paying quantities, sharing the profits and losses of said enterprise. That the plaintiff should receive as royalty free from all expenses, for the use of said mines, one-eighth of all the oil and gas produced from said mines, and that the shares of said parties in said business and its profits should be: This defendant one-half; the plaintiff, one-fourth; and the defendant, H. B. Martin, one-fourth. Pursuant to said understanding and arrangement so entered into, the plaintiff and this defendant and the defendant, H. B. Martin, for the mutual considerations of giving their credit, money, attention and time to the conduct of said business, made, executed and mutually delivered their certain contract of partnership in writing, a copy of which is exhibited in plaintiff's petition as Exhibit D.

Defendant says that it was understood at the time between the plaintiff and the defendant Martin and this defendant, that the defendant, Bradshaw, would receive an assignment of a part of the interest of this defendant in said partnership contract. It was, however, agreed between the parties to said contract referred to as Exhibit D, that the said Bradshaw would participate in the conduct and operation of said mining business. And defendant says that the plaintiff, at the time of the execution of said partnership contract, was twenty-one years of age and of more than average intelligence, and of at least three years active successful experience in business. That the plaintiff was fully advised of the value of his said lands and the mines thereon, of the necessary cost of equipping the same for operation, and of the probable profits of such operation, and that the plaintiff was also aware of all laws and statutes and decisions of the courts bearing upon his right, title and interest in said lands and his contracts in relation thereto.

129 And defendant says that pursuant to the terms of the aforesaid contract of partnership, this defendant, the defendant Martin and the plaintiff purchased of divers persons equipment consisting of miscellaneous equipment in the sum of \$23,387.94, buildings and houses for workmen at a cost of \$903.13; rigs and derricks for oil wells, \$4,084.21; pipe lines \$5,629.05; tanks \$2,490.00; tools \$29.35; supplies \$456.57; pumping \$2,897.22; supervision \$2,295.96; pulling and cleaning wells \$2,707.83; gen-

eral labor \$5,153.48; general expense \$365.18; freight and express \$249.64; telegrams expense \$81.60; team and livery hire \$3,106.45; use of tools and repairs, \$626.57; an aggregate expense of \$——. That they entered upon the possession of said premises and proceeded in the mining operations thereon; that owing to the diligent, careful and competent care and attention to said mines given by the plaintiff and the said defendants, they were greatly improved in their production and value; that the productive capacity of said mines were increased from about 290 barrels per day to more than 500 barrels per day; that the value of said property was thereby greatly enhanced so that said mines with the equipment provided as aforesaid for the same, are now more than quadrupled in value.

And this defendant says that he has agreed to transfer to the defendant, A. E. Bradshaw, three-eighths of his interest in said contract, of partnership, and to the defendant, Al Brown, two-eighths of the same, but that no actual transfer of said interest has yet been made.

130 And defendant says that the conduct of said business has produced large profits of which the plaintiff has from time to time both before and since the commencement of this action, taken his share under the terms of said partnership contract. That the plaintiff has received from time to time all the benefits of said contract accruing to him with full and competent knowledge of all the facts relating thereto, and defendant says that plaintiff ought to be, and is, in equity, estopped to deny the validity of said partnership contract for any cause whatever.

And this defendant says and avers that of the earnings and profits of the business of said co-partnership, since the 8th day of February, 1911, the plaintiff has received and withdrawn, in cash, the sum of \$25,293.45, all of which he still retains. That a considerable part of said profits have been taken by the plaintiff since the commencement of this action, and that all of said receipts by the plaintiff have been taken and received with full knowledge on his part of all the facts and circumstances surrounding the creation of said co-partnership, the execution of the partnership contract and all the facts and circumstances entering into the conduct of the partnership business. And plaintiff has received, besides said receipts, the benefit of his share under the partnership of all of the betterments of said property including its equipment, its development and its preservation, which benefits are worth to the plaintiff not less than \$100,000; and this defendant says that the plaintiff *ought to be* and is estopped in equity to impeach or set aside said partnership contract.

131 Wherefore, this defendant, having fully answered plaintiff's petition, prays that the plaintiff take nothing by this action, that this defendant recover his costs and all other and further relief to which he may be, in equity and good conscience, entitled.

*Attorneys for Defendant G. R. McCullough.*

Endorsements: No. 3125. District Court. Thomas Gilcrease vs. G. R. McCullough et al. Separate Answer of G. R. McCullough. District Court, State of Oklahoma, County of Tulsa. Filed Jun- 15, 1912. W. W. Stuckey, District Clerk. Martin, Bush & Murry, Attorneys for Defendants, Tulsa, Oklahoma.

132 And thereupon on the same day to-wit: the 15th day of June, 1912, there was filed the Separate Answer of the Defendant A. E. Bradshaw.

Which said Separate Answer is in the words and figures following, to-wit:

133 STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

In the District Court.

No. —.

THOMAS GILCREASE, Plaintiff,

VS.

G. R. MCCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Separate Answer of Defendant A. E. Bradshaw.*

Comes now said defendant, A. E. Bradshaw, leave of court first having been obtained, and for his separate answer to the petition of plaintiff filed in said cause, says and avers:

That he denies each and every allegation and averment in said petition contained except such as are hereinafter specifically admitted, explained and modified.

This answering defendant admits that the plaintiff is a citizen by blood of the Creek Nation or Tribe of Indians, and has been enrolled on the tribal rolls of said nation made by the Dawes

134 Commission to the Five Civilized Tribes, but defendant says that he is informed and believes and, therefore, avers the fact to be that said plaintiff was so enrolled as of the age of nine years on the 8th day of February, 1899, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

And answering defendant further admits that as such citizen of member of the Creek Nation or Tribe of Indians, plaintiff was entitled to and received an allotment of the lands of the said Creek Nation consisting of 160 acres, including surplus and homestead, lying, situate and being as alleged in plaintiff's petition, and that said lands were, on or about the 25th day of August, 1902, duly patented and conveyed to the plaintiff by the said Creek Nation.

And answering defendant admits that the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, are each

and all citizens of the State of Oklahoma and residents of the city of Tulsa and county of Tulsa in said state. That the defendant, G. R. McCullough, is president of the First National Bank of Tulsa, Oklahoma, and this defendant is cashier of said bank; and that before the connection of G. R. McCullough with this defendant with said First National Bank, they were each stockholders and officers of the Bank of Oklahoma; and that the defendant, H. B. Martin, is an attorney at law and practicing at the city of Tulsa in the State of Oklahoma for the past four years, and has at various times and in divers cases represented, in his professional capacity, the  
135 Bank of Oklahoma and the First National Bank of Tulsa, Oklahoma.

And answering defendant admits that the Bank of Oklahoma nationalized in the year 1911, that is, become a national bank.

And answering defendant admits that the aforesaid land allotted to the plaintiff is situated in the oil field which is commonly known as Glenn Pool, and is underlaid with large and valuable deposits of petroleum.

And answering defendant admits that in the month of September, 1906, the plaintiff, through his guardian, one William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Milliken, embracing the land hereinbefore described, and that Milliken proceeded to develop the same for oil and drilled upon said land between the fall of 1906 and the summer of 1909, some forty-nine wells. That in August of 1909 about forty-two of said wells were producing oil but whether said wells were producing at said time more than twenty-five thousand barrels of oil per month, as alleged in plaintiff's petition, this answering defendant is not informed and neither admits nor denies.

And answering defendant admits that the plaintiff, on or about the 24th day of August, 1909, made, executed and delivered to the defendant, G. R. McCullough, the oil and gas mining lease exhibited in plaintiff's petition as Exhibit A, and that on or about the 18th day of September, 1908, the plaintiff has executed a  
136 warranty deed, conveying said lands to his mother, Lizzie Gilcrease, which deed was recorded in the office of the Register of Deeds in Record Book 33 at page 529, and that the said Lizzie Gilcrease, on or about September 4, 1909, executed to the defendant, G. R. McCullough, the oil and gas mining lease exhibited in plaintiff's petition as Exhibit B, and admits that on or about the 21st day of April, 1910, the plaintiff and the defendant, H. B. Martin, executed the written contract exhibited in plaintiff's petition as Exhibit C.

And answering defendant admits that on or about the 22nd day of October, 1910, the defendant, G. R. McCullough, sold and transferred to the plaintiff a one-fourth interest in the leases heretofore executed, to the said defendant, and sold and transferred to the defendant, H. B. Martin, a one-fourth interest in said leases. That previous to the said 22nd day of October, 1910, the defendant, G. R. McCullough, had paid to the plaintiff the sum of \$4,000.00 of the original bonus by him agreed to be paid for the leases theretofore

executed to said defendant by the said Gilcrease and his mother, Lizzie Gilcrease, according to the terms of the contract between the said plaintiff and the said defendant, McCullough. That there remained of the said original bonus so agreed to be paid, the sum of \$13,000.00, which was still unpaid by the defendant, McCullough, to the said Gilcrease, but avers that no part of said sum was at said time due.

And answering defendant admits that on or about the said 22nd day of October, 1910, the plaintiff surrendered to the defendant, G. R. McCullough, as part consideration of the purchase by the plaintiff on said date, of a one-fourth interest in said leases, the said obligation of said defendant, McCullough to the plaintiff of the sum of \$13,000.00, and paid to said defendant an additional sum of \$2,000.00, aggregating the sum of \$15,000.00, the price agreed upon between the plaintiff and said defendant as the purchase price of said interest.

And defendant admits that on the 8th day of February, 1911, the lease theretofore held upon said lands by the said William H. Milliken and his associates expired, and that the plaintiff and the defendants, G. R. McCullough and H. B. Martin, on said 8th day of February, 1911, made, executed and delivered, mutually, the written contract exhibited in plaintiff's petition as Exhibit D; and that on the 11th day of December, 1911, the defendant, H. B. Martin, made, executed and delivered to the plaintiff an assignment of three-fourths of the interest of said defendant under the said contract exhibited in plaintiff's petition as Exhibit D., by the written instrument exhibited in plaintiff's petition as Exhibit F; and this defendant admits that theretofore the defendant H. B. Martin had executed to the defendant, G. R. McCullough, an assignment of one-fourth of the interest of said defendant, Martin, in said contract exhibited in plaintiff's petition as Exhibit D; but this answering defendant says that the said assignment to said defendant, McCullough, was executed and delivered by the said defendant, H. B. Martin, as security for the payment of certain indebtedness at the time due from the said defendant H. B. Martin, to the defendant, G. R. McCullough, and to the First National Bank of Tulsa, Oklahoma, of which said G. R. McCullough was at the time president, and that said assignment was not intended as a conveyance or transfer of said interest except as security as aforesaid.

And defendant further answering, says that the plaintiff, Thomas Gilcrease, was not a person without education, business judgment and ability, as alleged in his petition, at any of the times mentioned therein, but that on the contrary the said plaintiff is well educated and has been accustomed to transact business of an important nature for several years before any of the times mentioned in plaintiff's petition. That plaintiff had theretofore conducted a store under his own management. That in February, 1909, the plaintiff, being a resident of the county of Wagoner, State of Oklahoma, for the purpose of obtaining the decree and judgment of that court conferring upon the plaintiff his rights of majority and removing his dis-

abilities of nonage; that due and legal service was had upon said application and that said court having jurisdiction of the plaintiff and of the subject matter of his said petition, heard evidence as to the competency and business capacity of the plaintiff, and found and adjudged that the plaintiff was capable of transacting properly his own business and affairs, and rendered its judgment and decree granting plaintiff's said application and conferring upon him full right and authority to transact all business with the same effect as if he had reached the age of twenty-one years. That upon the rendering of said judgment and decree, the county court of Muskegee county, Oklahoma, in which a guardian had theretofore  
139 been appointed for the person and estate of the plaintiff, discharged said guardian and caused plaintiff's property to be delivered over into his own hands and that plaintiff thereupon on or about the — day of February, 1909, assumed the control of all of his business affairs and has ever since conducted his business by his own efforts successfully.

And this defendant especially denies that prior to the execution of the oil and gas mining lease made by plaintiff to said defendant, G. R. McCullough, on the 24th day of August, 1909, or at any other time, exhibited in plaintiff's petition as Exhibit A., that any conspiracy, confederation, understanding or agreement of any kind was made between the defendant, G. R. McCullough, and his co-defendant H. B. Martin, on the subject of said transaction, and defendant says that the said defendant, G. R. McCullough, did not consult with or advise with the defendant, H. B. Martin, at any time in said transaction. That he is informed and believes, and therefore, avers the fact to be, that the defendant, H. B. Martin, had no knowledge of the negotiations pending between the plaintiff and this defendant and the defendant, G. R. McCullough, pertaining to the making of said contract, until the defendant, H. B. Martin, was called upon by the plaintiff and this defendant as counsel for the plaintiff to write the contract already theretofore agreed upon between the plaintiff, G. R. McCullough and this defendant. And this defendant denies that at any of the times mentioned in plaintiff's petition, the plaintiff was in any wise deceived, influenced or over-reached by this defendant or any of his co-defendants with  
140 reference to any of the transactions complained of in plaintiff's petition; but defendant says and avers that all of said transactions were conducted on the part of the plaintiff of his own free will and choice and upon his own initiative, with full knowledge on the part of the plaintiff of all the facts and circumstances of said transactions and all of them, and especially with full knowledge as to the value of the interests involved in said transactions, the condition of the property there in involved and the law governing the plaintiff's rights in dealing therewith.

And defendant further says that at the time of the execution of said lease exhibited as aforesaid in plaintiff's petition as Exhibit A., this defendant had no intimate knowledge of the value of said property, no experience in the oil mining business and very little knowledge thereof, all of which facts were well known to the plain-



tiff. But defendant avers that said oil and gas mining lease last above referred to was not at the time of its execution of the market value of more than \$17,000.00 bonus. That the plaintiff had, before executing said lease to the defendant, G. R. McCullough, negotiated in the oil and gas mining lease market at and about the city of Tulsa for a long time, endeavoring to effect a sale of said lease for the sum of \$10,000.00, but was unable to find a sale thereof at said price until he succeeded in selling the same to this defendant and the defendant, G. R. McCullough. That because of the risks and uncertainties and hazards of the oil and gas mining business and the long period of time it would be before the lessee could  
141 come into possession of said property, said lease at the time of its execution on the 24th day of August, 1909, was not worth to exceed \$10,000.00 bonus.

And defendant further says that this defendant was not appointed the guardian of the plaintiff by the procurement of the defendant, H. B. Martin, as alleged in plaintiff's petition but that this defendant was selected by the plaintiff himself to be appointed as special guardian merely for the purpose of facilitating the collection of certain moneys due to the plaintiff and then in the hands of the U. S. Indian Superintendent at Muskogee, Oklahoma. That the only authority given this defendant by the order of his appointment in the county court of Tulsa county, Oklahoma, was to collect said funds, and that immediately upon the collection of said funds, they were paid over upon the request of the plaintiff and the order of the court.<sup>v</sup> court aforesaid to the plaintiff in person or according to this directions and order.

And answering defendant says that the said pretended appointment of this defendant as guardian aforesaid was wholly without jurisdiction for the reason that theretofore in a proceeding pending in the county court of Muskogee county, Oklahoma, the court at the time having jurisdiction of the plaintiff and his estate, a guardian had been duly and regularly appointed for the person and estate of plaintiff, and that said proceedings and cause had not been transferred from the said county court of Muskogee county but remained therein, and that the county court of Tulsa county had no jurisdiction in the premises. That the only purpose and effect of the  
142 pretended appointment of this defendant as guardian, as aforesaid, was to induce the U. S. Indian Superintendent to pay over the funds in his hands to which the plaintiff was entitled so that the plaintiff might receive and enjoy the same.

And defendant says that in none of the transactions aforesaid, or any of the matters entering into the same, was there any deception, fraud, or conspiracy practiced upon or against the said plaintiff by this defendant or any of his co-defendants, but that all of said transactions were conducted in good faith, fairly and with the full knowledge of the plaintiff therein.

Defendant further says that on the 8th day of February, 1911, the lease upon the plaintiff's said lands under which the said William H. Milliken and his associates had mined and operated said lands for oil, expired; that under the terms of said lease, the said

Milliken was entitled to take away the derricks, lead lines, tubing, rods, engines, powers and all the equipment for mining purposes then upon the said premises except the casing in the wells, and was entitled to remove the casing from such wells as had ceased to produce oil in paying quantities. That under the terms of said lease, the said Milliken had sixty days from the expiration thereof in which to remove said mining equipment. That it required an investment and expenditure, in order to purchase proper equipment to continue the operation upon said premises of mining oil of a large sum of money, to-wit: about \$40,000.00. That it was also

necessary to devise some means of preventing an interruption of the operations of the said wells for the reason that if

they were permitted to stand idle for any considerable period, the water would flow in upon the oil sand in said wells and totally destroy their productiveness and value. And defendant says that the plaintiff had no personal experience in oil and gas mining operations, and no money or credit with which to provide the necessary equipment of said premises for oil and gas mining purposes and preserve the same from being injured and destroyed for want of operation. The plaintiff was desirous of engaging in the operation of the open mines upon said land and did not wish to sell the same or sell the leasehold interest therein. The plaintiff thereupon proposed on or about the 8th day of February, 1911, to this defendant and the defendants, H. B. Martin and G. R. McCullough, to enter into a contract of partnership for the purpose of equipping said premises for oil and gas mining purposes and operating the same so long as oil and gas, or either of them, might be found upon said premises. It was thereupon agreed between the plaintiff and this defendant and the defendants, McCullough and Martin, that said parties, their heirs, representatives or assigns, would purchase the necessary equipment aforesaid and provide the necessary means for operating the open mines upon said premises and continue the operation thereon so long as oil and gas or either of them should be found in paying quantities, sharing the profits and losses of said enterprise. That the plaintiff should receive as royalty free from all expenses, for the use of said mines, one-eighth of all the oil and gas produced from said mines, and that the shares of said parties

in said business and its profits should be; The defendant, G. R. McCullough, one-half; the plaintiff, one-fourth, and the defendant, H. B. Martin, the remaining one-fourth. Pursuant to said understanding and arrangement so entered into, the plaintiff and the defendants, G. R. McCullough and H. B. Martin, for the mutual considerations of giving their credit, money, attention and time to the conduct of said business, made, executed and mutually delivered their certain contract of partnership in writing, a copy of which is exhibited in plaintiff's petition as Exhibit D.

Defendant says that it was understood at the time between the plaintiff and the defendants, G. R. McCullough and H. B. Martin, that this defendant would receive an assignment of a part of the interest of said defendant, McCullough, in said partnership contract. It was, however, agreed between the parties to said contract referred

to as Exhibit D., that this defendant would participate in the conduct and operation of said mining business. And defendant says that the plaintiff, at the time of the execution of said partnership contract, was twenty-one years of age and of more than average intelligence, and of at least three years active successful experience in business. That the plaintiff was fully advised of the value of his said lands and the mines thereon, of the necessary cost of equipping the same for operation, and of the probable profits of such operations, and that the plaintiff was also aware of all laws and statutes and decisions of the courts bearing upon his right, title and interest in said lands and his contracts in relation thereto.

145 And defendant says that pursuant to the terms of the aforesaid contract of partnership, the defendants, G. R. McCullough and H. B. Martin, and the plaintiff purchased of divers persons equipment consisting of miscellaneous equipment in the sum of \$23,387.92; building and houses for workmen at a cost of \$900.13; rigs and derricks for oil wells, \$4084.21; pipe lines \$5629.05; tanks, \$2490.00; tools \$29.35; supplies \$456.57; pumping \$2897.83; supervision \$2295.96; pulling and cleaning wells, \$2707.83; general labor \$5153.48; general expenses \$365.18; freight and express \$249.64; telegrams expense \$81.60; team and livery hire \$3106.45; use of tools and repairs, \$628.57; an aggregate expense of \$—. That they entered upon the possession of said premises and proceeded in the mining operation thereon; that owing to the diligent, careful and competent care and attention to said mines given by the plaintiff and the said defendants, they were greatly improved in their production and value; that the productive capacity of said mines was increased from about 290 barrels per day to more than 500 barrels per day; that the value of said property was thereby greatly enhanced so that said mines with the equipment provided as aforesaid for the same, are now more than quadrupled in value.

And this defendant says that he has contracted and agreed with the defendant, G. R. McCullough, that the defendant, McCullough, shall assign and transfer to this defendant three-eighths of his interest in said contract of partnership, but that said transfer has not yet been made.

146 And defendant says that the conduct of said business has produced large profits of which the plaintiff has from time to time, both before and since the commencement of this action, taken his share under the terms of said partnership contract. That the plaintiff has received from time to time all the benefits of said contract accruing to him with full knowledge of all the facts relating thereto, and defendant says that plaintiff ought to be and is, in equity, estopped to deny the validity of said partnership contract for any cause whatever.

And this defendant says and avers that of the earnings and profits of the business of said co-partnership, since the 8th day of February, 1911, the plaintiff has received and withdrawn in cash, the sum of \$25,292.45; all of which he still retains. That a considerable part of said profits have been taken by the plaintiff since

the commencement of this action, and that all of said receipts by the plaintiff have been taken and received with full knowledge on his part of all the facts and circumstances surrounding the creation of said co-partnership and execution of the partnership contract and all the facts and circumstances entering into the conduct of the partnership business. And the plaintiff has received, besides said receipts, the benefit of his share under the partnership of all of the betterments of said property, including its equipment, its development and its preservation, which benefits are worth to the plaintiff not less than \$100,000.00; and this defendant says that the

147 plaintiff ought to be and is estopped in equity to impeach or set aside said partnership contract.

Wherefore, this defendant having fully answered plaintiff's petition, prays that the plaintiff take nothing by this action, that this defendant recover his costs and all other and further relief to which he may be, in equity and good conscience, entitled.

STUART, CRUCE & GILBERT,  
MARTIN, BUSH & MURRY,  
*Attorneys for Defendant A. E. Bradshaw.*

Endorsements: No. 3125. District Court. Thomas Gilcrease vs. G. R. McCullough et al. Separate Answer of A. E. Bradshaw. District Court, State of Oklahoma, County of Tulsa. Filed Jun- 15, 1912. W. W. Stuckey, District Clerk.

148 And thereupon on the same day to-wit: the 15th day of June, 1912, there was filed the separate Answer of the defendant, Al Brown;

Which said Separate Answer is in the words and figures following, to wit:

149 STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

In the District Court.

No. —.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Separate Answer of Defendant Al Brown.*

Comes now the said defendant, Al Brown, leave of court first having been obtained, and for his separate answer to the petition of plaintiff filed in said cause, says and avers:

That he denies each and every allegation and averment in said

petition contained, except such as are hereinafter specifically admitted, explained or modified.

This answering defendant admits that the plaintiff is a citizen by blood of the Creek Nation or Tribe of Indians, and has been enrolled on the tribal rolls of said nation made by the Dawes Commission to the Five Civilized Tribes, but defendant says that he is informed and believes and therefore, avers, the facts to be that said plaintiff  
150 was so enrolled as of the age of nine years on the 8th day of February, 1899, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

And answering defendant further admits that as such citizen or member of the Creek Nation or Tribe of Indians, plaintiff was entitled to and received an allotment of the lands of the said Creek Nation, consisting of 160 acres, including surplus and homestead, lying, situate and being as alleged in plaintiff's petition, and that said lands were, on or about the 25th day of August, 1902, duly patented and conveyed to the plaintiff by the said Creek Nation.

And answering defendant admits that the defendant- G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, are each and all citizens of the State of Oklahoma and residents of the city of Tulsa and county of Tulsa in said State. That the defendant, McCullough, is president of the First National Bank of Tulsa, Oklahoma, and A. E. Bradshaw is cashier of said Bank; and that before the connection of the defendants, G. R. McCullough and A. E. Bradshaw with said First National Bank, they were each stockholders and officers of the Bank of Oklahoma; and that the defendant, H. B. Martin, is an attorney at law and practicing at the city of Tulsa in the State of Oklahoma for the past four years, and has at various times in divers cases represented, in his professional capacity the Bank of Oklahoma and the First National Bank of Tulsa.

And answering defendant admits that the Bank of Oklahoma  
151 nationalized in the year 1911, that is, became a national bank.

And answering defendant admits that the aforesaid land allotted to the plaintiff is situated in the oil field which is commonly known as Glenn Pool, and is underlaid with large and valuable deposits of petroleum.

And answering defendant admits that in the month of September, 1906, the plaintiff, through his guardian, one William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Milliken, embracing the land hereinbefore described, and that Milliken proceeded to develop the same for oil and drilled upon said land between the fall of 1906 and the summer of 1909, some forty-nine wells. That in August of 1909, about forty-two of said wells were producing oil, but whether said wells were producing at said time more than twenty-five thousand barrels of oil per month, as alleged in plaintiff's petition, this answering defendant is not informed and neither admits nor denies.

And answering defendant admits that the plaintiff, on or about the 24th day of August, 1909, made, executed and delivered to the defendant, G. R. McCullough, the oil and gas mining lease ex-



hibited in plaintiff's petition as Exhibit A, and that on or about the 18th day of September, 1908, the plaintiff had executed a warranty deed, conveying said lands to his mother Lizzie Gilcrease, which deed was recorded in the office of the Register of deeds in Record Book 33 at page 529, and that the said Lizzie Gilcrease, on

152 or about September 4, 1909, executed to the defendant, G. R. McCullough, the oil and gas mining lease exhibited in plaintiff's petition as Exhibit B, and admits that on or about the 21st day of April, 1910, the plaintiff and the defendant, H. B. Martin, executed the written contract exhibited in plaintiff's petition as Exhibit C.

And answering defendant admits that on or about the 22nd day of October, 1910, the defendant, McCullough, sold and transferred to the plaintiff a one-fourth interest in the leases theretofore executed by the plaintiff and his mother, Lizzie Gilcrease, to the said defendant, and sold and transferred to the defendant, H. B. Martin, a one-fourth interest in said lease.

And this defendant, for further answer, says that he denies specifically that this defendant, together with his co-defendants or any of them, at any time, conspired together with reference to any of the transactions set out and complained of in plaintiff's petition, and this defendant says that he has not, with reference to any of said transactions, participated either directly or indirectly in any of the negotiations with plaintiff; that he has had no dealings with plaintiff whatever with reference to any of the matters complained of in plaintiff's petition; that he had no dealings, at any time, or transactions, of any character, with reference to any of the matters and things complained of in plaintiff's petition with the defendant, H. B. Martin, nor the defendant, A. E. Bradshaw; and defendant

says that the only transactions this defendant has had with  
153 reference to any of the contracts, matters or things complained of in plaintiff's petition, consists of an agreement made between this defendant and the defendant, G. R. McCullough, that the defendant G. R. McCullough, would assign and transfer to this defendant two-eighths of the interest of the said defendant, G. R. McCullough in the partnership contract made and entered into between the defendants, G. R. McCullough and H. B. Martin, and the plaintiff on the 8th day of February, 1911, in consideration that this defendant would assume and pay his proportionate share of the liabilities and expenses arising under said partnership contract; that said agreement was an oral agreement and was made and entered into about the 8th day of February, 1911, and that said transfer has not yet been made in writing.

This defendant further answering says that he denies that any fraud, deceit, undue influence or over-reaching has been practiced against said plaintiff with reference to any of the matters and things complained of in plaintiff's petition by this defendant or any of his co-defendants.

Wherefore, the defendant, Al Brown, prays that he may go hence without day and reciver his costs herein expended, and for all other



and further relief to which he may be, in equity and good conscience, entitled.

STUART, CRUCE & GILBERT,  
MARTIN, BUSH & MURRY,  
*Attorneys for Defendant Al Brown.*

154-156    Endorsements: No. 3125. District Court. Thomas Gilcrease vs. G. R. McCullough et al. Separate Answer of Al Brown. District Court. State of Oklahoma County of Tulsa. Filed Jan. 15, 1912. W. W. Stuckey District Clerk. Martin, Bush & Murry, Attorneys for Defendants, Tulsa, Oklahoma.

\* \* \* \* \*

157    In the District Court of Tulsa County, State of Oklahoma.

No. 3125.

THOMAS GILCREASE, Plaintiff,

VS.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Reply to Separate Answer of H. B. Martin.*

Comes now the plaintiff Thomas Gilcrease by his attorneys Bid-dison & Campbell and Preston C. West and for his reply to the separate answers of the defendant, H. B. Martin, filed herein, states:

I.

That he denies all the allegations of said answer other than those allegations which admit the averments of plaintiff's petition.

II.

And for further reply to said answer, the plaintiff denies that he was enrolled by the Commission to the Five Civilized Tribes as of the age of nine years on the 8th day of February, 1899, and avers the truth and the fact to be that he was duly enrolled by said Commission as being nine years of age on the 9th day of June, 1899, and that by said rolls which are made conclusive evidence of

158    his age by the Act of Congress approved May 27, 1908, the plaintiff did not become twenty-one years of age and did not attain his majority so as to be legally capable of transacting his own affairs and dealing with his allotment until the 9th day of June, A. D. 1911.

III.

For further reply to said answer, the plaintiff says that he denies that at the time he entered into the written contract of April 21,

1910, retaining the defendant H. B. Martin as his counsel he had any knowledge or information of any arrangement, promise, contract or agreement between said Martin and his then law partner B. T. Hainer, and denies that such arrangement was ever suggested or intimated to or discussed in any shape, manner or form between plaintiff and said defendant Martin, and denies that he acquiesced in or consented to any such arrangement or had any knowledge whatever of the same.

#### IV.

Further replying to said answer, the plaintiff denies that he had prior to February, 1909, conducted a store under his own management, and denies that in February, 1909, or at any other time there was ever made and entered any order or decree of the district court of Wagoner county or of any other court, whereby there was granted to plaintiff full right and authority to transact all his business with the same effect as if he had reached the age of twenty-one years or any authority whatsoever to transact any business, but states and shows to the court that the alleged and pretended order made by said district court of Wagoner county was wholly without any  
159 jurisdiction in the premises, and that the alleged petition filed in said court was filed by the defendant H. B. Martin and that the plaintiff acted under the domination, control and influence of the said Martin, and that all that this plaintiff did in and about said matter was done upon the advice and direction of the said H. B. Martin and in full reliance upon said H. B. Martin both as to the legal aspects of the matter and as to the same being for the best interest and advantage of this defendant; that neither the district court of Wagoner county nor any other county had any such jurisdiction as a matter of fact, and that the pretended proceedings in said court did not conform to the statute in force in the State of Oklahoma with reference to the removal of disabilities from minors, and that no court could or did in February, 1909, or at any other time, confer upon the plaintiff, who was then a minor, any right or authority whatsoever to transact his business as though of full age, and that the pretended order plead by the defendant is a nullity.

#### V.

For further reply to said answer, the plaintiff states and shows to the court that it is not true as alleged in the answer of said defendant Martin that prior to the execution of the pretended lease of August 24, 1909, said Martin had no business or social relations with defendants A. E. Bradshaw and Al Brown, and not true that defendant Martin was not consulted by the plaintiff with reference to the making of said lease, and not true that he was not consulted  
160 as to the advisability of executing said lease, and that it is not true that at the time and before the execution of said pretended lease, H. B. Martin was not retained or employed by the plaintiff to advise him with reference to any of his business or transactions except as to the legal questions arising therein, but that in

truth and in fact the plaintiff herein had not only for many months preceding the 24th day of August, 1909, applied to and received advice from said H. B. Martin with reference to the policy to be pursued in his business transactions and the advisability of the various transactions into which he entered but that he relied very largely upon the counsel and advice of said Martin, and this the defendant Martin well knew; and that on the 24th day of August, 1909, this plaintiff was practically under the complete domination and control of said Martin and so continued for a long time thereafter and until within less than thirty (30) days prior to the filing of the petition in this cause, and that said Martin well knew of his influence over and domination of the will of this plaintiff and of this plaintiff's reliance upon him not only as a legal adviser, but as a friend and business counselor as well and has used said influence and said reliance to the undoing of this plaintiff; and the plaintiff denies that defendant Martin had no communication with the defendant G. R. McCullough with reference to the execution of said pretended lease of August 24, 1909, before the occasion of the execution of said instrument.

## VI.

For a further reply to said answer plaintiff states and  
161 shows to the court that it is not true as alleged in said answer that the oil and gas mining lease alleged to have been executed by this plaintiff to the defendants in this cause was not at the time of its execution, of the value of more than Seventeen Thousand Dollars bonus, and denies that plaintiff had been for a long time endeavoring to negotiate a sale of said lease for Ten Thousand dollars but was unable to find a sale thereof at said price, and denies that said lease was not at the time of its execution to-wit: the 24th day of August, 1909, worth to exceed Ten Thousand dollars, but alleges the truth and the fact to be that a valid lease upon the premises named in said paper of August 24, 1909, would have been worth a bonus of not less than \$—.

## VII.

For further reply to said answer, plaintiff denies that it was at his direction that the lease from Lizzie Gilcrease to the defendant McCullough executed on the 4th day of September, 1909, was prepared and submitted to said Lizzie Gilcrease; but states and shows to the court that the truth and the fact in regard thereto was that said lease was suggested, advised and prepared by the defendant H. B. Martin, and that the plaintiff exercised no independent will or judgment in regard thereto and owing to the influence of said H. B. Martin over him he was at the time incapable of executing such independent will or judgment and that Lizzie Gilcrease, the mother of this plaintiff, although possessed of some education, is wholly  
without business training or experience or judgment, and  
162 that she equally with the plaintiff herein relied absolutely upon the defendant H. B. Martin in and about said matter.

## VIII.

For a further reply to the said answer, plaintiff says that it is not true as alleged in the separate answer of defendant H. B. Martin that the county court of Tulsa county was without jurisdiction to appoint A. E. Bradshaw guardian of the plaintiff; that in truth and in fact said county court of Tulsa county did have jurisdiction and was the only court which had or could exercise any such jurisdiction, and that the previous guardianship pending in Muskogee county had long since been terminated and there was no guardian for plaintiff at the time of the appointment of A. E. Bradshaw, and that in all the matters in and about the appointment of said A. E. Bradshaw, plaintiff relied implicitly upon the legal advice and business judgment of the defendant H. B. Martin, and that every act and step taken by the plaintiff in said matter was done under the direction of the said H. B. Martin, and none of said acts would have been done nor steps taken but for the reliance of plaintiff upon the direction, counsel and advice of the defendant H. B. Martin, both as to the legality thereof and as to their expediency.

## IX.

For a further reply, the plaintiff denies that he ever said to the defendant H. B. Martin that he was perfectly satisfied with the alleged and pretended lease made to the defendant McCullough and desired to carry out said pretended contract and did not wish to adopt a course of repudiation or dishonesty; that this plaintiff  
163      has never at any time desired to adopt a course of dishonesty and does not now so desire, but that he would never at any time have made said contract had he been fully advised of all the facts and fairly counseled by those in whom he placed trust and reliance. Plaintiff says that it is not true that pursuant to any purpose declared by plaintiff to carry out his alleged contract with McCullough, the defendant Martin began negotiations to purchase an interest in said contract for plaintiff, and it is not true that the plaintiff requested the defendant Martin to join him in such purchase, but the truth and the fact in regard to said matter is as alleged in plaintiff's petition; that it is not true that the plaintiff insisted that the defendant Martin purchase an interest and offered to assist him in obtaining funds for such purpose; and not true that the defendant Martin consented to and did purchase from McCullough a one-fourth interest at the urgent request of the plaintiff; but that the truth of said matter is as alleged in plaintiff's petition and not otherwise; that it is not true that at the time of said transaction the defendant Martin was obliged to borrow and did borrow from the defendant McCullough and others a large part of the funds with which his purchase was made; and not true that any of said facts or any part of such facts were known to the plaintiff, but that in truth no such facts existed and no consideration whatever was ever paid by this defendant Martin for his pretended interest in said leasehold.

## X.

For a further reply to said answer, the plaintiff denies that he proposed on or about the 8th day of February, 1911, to the defendant H. B. Martin and the defendants G. R. McCullough and A. E. Bradshaw, to enter into a contract of partnership for the purpose of equipping the premises involved in litigation in this suit for oil and gas mining purposes and operating the same so long as oil and gas might be found upon said premises; and that it is not true that the plaintiff ever entered into any contract of copartnership with said defendants, but that the instrument of writing attached to plaintiff's petition as Exhibit "D" and referred to in defendant's answer, was the only writing or contract entered into and that the same was entered into at the suggestion and instance of the defendant Martin and his co-defendants and while the domination and influence of said defendant Martin still continued and while the plaintiff was still under the complete influence and dominion of the said guardian as to all of the matters pertaining to his business, and that said contract was in truth and in fact, as alleged in plaintiff's petition, but the culminating step in the conspiracy and design formed by the defendants to obtain from the plaintiff the property of the plaintiff for a mere fraction of its real value and to so use the influence of the defendant Martin over said plaintiff as to obtain for said Martin and his co-defendants a large interest in said property without the payment of any real consideration by them or either of them; and

165 the plaintiff denies that said paper writing would constitute a contract of copartnerhsip even if it were a valid contract at all; and the plaintiff denies that he knew or understood what the relationship of A. E. Bradshaw to the other defendants was or what his share in said contract was to be, or what part he was to play therein until just prior to the institution of this suit, and denies that he, the said plaintiff, was fully advised of the value of his lands and of the mines thereon and of the necessary cost of equipping the same and the probable profits arising from operation thereof; and denies that he was aware of all the laws, statutes and decisions of the courts bearing upon his right, title and interest in said lands; but states the truth and the fact to be that the only knowledge he had of his legal status and of the effect of the said several instruments executed by him was derived from the defendant H. B. Martin, and that each and every of the instruments under and by and through which the defendant Martin and his co-defendants claim in this cause were executed while the plaintiff was a minor and legally incapable of executing the same and while he was still under the influence and domination of the said defendant H. B. Martin and still relied implicitly upon his counsel and advice both as to the legal effect of said matters and as to the best business policy to be pursued by the plaintiff and the expediency of making and entering into said contract.

## XI.

For further reply to said answer, the plaintiff says that he has not kept the books pertaining to the lease involved in this controversy

and has not been kept fully advised of the receipts and expenditures and is not now possessed of sufficient knowledge or information to either affirm or deny the allegations contained in the answer of this defendant with reference to the amount so expended. He admits that the defendants have entered into possession of the premises and that they are still in possession thereof and that so far as he knows, the operations conducted on said premises have been properly conducted, but he denies that the value of said property has been enhanced thereby other than the value of the equipment placed thereon, and states the truth and the fact to be that said lease would have been of the same value under the management of any competent person; and the plaintiff denies that he has at any time after he became acquainted with the facts in regard to the transactions set out in his petition herein, accepted or received any benefits from this defendant or from any of his co-defendants growing out of said transactions, or done any other act that in equity will or ought to estop him to deny the validity of any and all of his said pretended leases, contracts and agreements, but that each and every of said leases, contracts, agreements and writings were entered into by this plaintiff while he was still a minor and legally incapable of executing the same and while he was still under the domination of the defendant H. B. Martin and still relied implicitly upon the good faith of said H. B. Martin and upon his ability to advise him correctly as to his legal status and also to counsel him as to the business policy to be pursued and while he was still in ignorance of the true state of facts with reference to said matters and in ignorance of the truth with reference to the relations existing and subsisting between the defendant H. B. Martin and his co-defendants herein.

## XII.

For further reply to said answer, the plaintiff denies that any demand made by B. T. Hainer, the former law partner of the defendant H. B. Martin, with reference to compensation for the time taken by said defendant Martin to look after his oil interest, was ever discussed with the plaintiff; that he ever assented thereto, denies that in truth or in fact any such demand was ever made; denies that \$12,500 would be a fair compensation therefor; denies that he ever understood, agreed or consented to or concurred in or had any knowledge of such arrangement; denies that the sum of \$12,500 or any other sum was ever paid by the defendant H. B. Martin in discharge of said claim, and denies that said transaction has no relation to or bearing whatever upon the issue involved in this suit.

## XIII.

For further reply to the said answer, plaintiff says that he denies in toto the statements contained in said answer with reference to his proposing on the 11th day of December, 1911, to the plaintiff, a settlement of their accounts, but admits that there was a settlement



had based, however, wholly upon the mistaken belief that defendant H. B. Martin was then the owner of an interest in a leasehold estate upon the premises involved in this controversy, and the plaintiff 168 avers that said transactions were as stated in plaintiff's petition and not otherwise; he denies that there was then or is now or ever at any time has existed, any partnership contract with reference to the premises involved in this suit, but states the truth and the fact to be that all of the property conveyed by plaintiff to defendant Martin in said transaction was without consideration.

## XIV.

And for further reply to the said answer, the plaintiff denies that on the 12th day of February, 1912, or at any other time after the plaintiff had caused to be dictated his petition in this cause and was about to file the same or ever at any time after plaintiff became aware of the truth in regard to these transactions he brought to the defendant Martin W. A. Branson and Henry Payne and stated to Mr. Branson and Mr. Payne in the presence of said defendant that said defendant owned the property where plaintiff then and now resides and advised the defendant Martin to contract with said Branson and Payne to have trees transplanted upon said property, and denies that the defendant Martin acted upon the advice of plaintiff in contracting with said Branson and Payne if he did so contract, but avers his willingness, if in fact any trees have been planted upon said premises, to allow the defendant Martin credit for the value which has thereby been imparted to said premises and to deduct the same from the amount which plaintiff is entitled to recover from said defendant upon final judgment in this cause; and the plaintiff 169 also avers his willingness that any taxes actually paid by this defendant upon the property heretofore conveyed by him to the defendant Martin may be credited against the amount of plaintiff's final recovery against said Martin in this action.

## XV.

And for further reply to the said answer, plaintiff denies that he has ever since the 11th day of December, 1911, or at any other time, with the knowledge of his rights in the premises and of the true condition and state of facts in regard to the transactions set out in his petition herein, taken, appropriated and enjoyed any profits arising from said transactions, or that he is estopped to deny the validity thereof; and denies that he has ever at any time since he discovered the truth in regard to said transactions done any act tending to ratify the same; but states the truth and the fact to be that he has at all times since he became aware of the facts and of his legal rights in the premises upheld the invalidity of all of said pretended contracts and conveyances and has demanded at all times that the defendant H. B. Martin and his co-defendants restore to him that which has been obtained from him without consideration and by virtue of their unlawful, wrongful and fraudulent transactions.

Wherefore, the plaintiff prays that he have a judgment and decree in this cause against this defendant as prayed for in plaintiff's petition filed herein, and that the court make all such orders and grant all such relief as the facts may warrant and the court shall in equity and good conscience deem proper.

P. C. WEST AND  
BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff.*

STATE OF OKLAHOMA,  
*Tulsa County, ss:*

Thomas Gilcrease, of lawful age, being first duly sworn, on his oath says:

That he is the plaintiff in the above entitled cause, and that he has read the above and foregoing reply to the separate answer of the defendant H. B. Martin; knows the contents thereof, and that the statements therein contained are true.

THOMAS GILCREASE.

Subscribed and sworn to before me this — day of July, 1912.

[SEAL.]

W. V. BIDDISON,  
*Notary Public.*

My Com. Ex. 11-22-1915.

171 On the back of which Reply appear the following endorsements, to-wit: No. 3125. In the District Court of Tulsa County, Oklahoma. Thomas Gilcrease, Plaintiff, vs G. R. McCullough et al., Defendants. Reply to Separate Answer of H. B. Martin. District Court, State of Oklahoma, County of Tulsa. Filed Aug. 7, 1912. W. W. Stuckey, District Clerk. Biddison & Campbell, Attorneys for Plaintiff.

172 And thereupon, on the same day, to-wit: the 7th day of August, 1912, there was filed the Reply of the plaintiff to the Separate Answer of the defendant, G. R. McCullough, which said Reply is in the words and figures following, to-wit:

173 In the District Court of Tulsa County, State of Oklahoma.

No. 3125.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. MCCULLOUGH, H. B. MARTIN, A. F. BRADSHAW, and AL BROWN, Defendants.

*Reply to Separate Answer of G. R. McCullough.*

Comes now the plaintiff Thomas Gilcrease by his attorneys Biddison & Campbell and Preston C. West and for his reply to the separate answer of the defendant G. R. McCullough, filed herein, states:

## I.

That he denies all the allegations of said answer other than those allegations which admit the averments of plaintiff's petition.

## II.

And for further reply to said answer, the plaintiff denies that he was enrolled by the Commission to the Five Civilized Tribes as of the age of nine years on the 8th day of February, 1899, and avers the truth and the fact to be that he was duly enrolled by said Commission as being nine years of age on the 9th day of June, 1811 and that by said rolls which are made conclusive evidence of his age by the Act of Congress approved May 27, 1908, the plaintiff did not become twenty-one years of age and did not attain his majority so as to be legally capable of transacting his own affairs and dealing with his allotment until the 9th day of June, A. D. 1911.

## III.

Further replying to said answer, the plaintiff denies that he had prior to February, 1909, conducted a store under his own management, and denies that in February, 1909, or at any other time there was ever made and entered any order or decree of the district court of Wagoner county or of any other court, whereby there was granted to plaintiff full right and authority to transact all his business with the same effect as if he had reached the age of twenty-one years or any authority whatsoever to transact any business, but states and shows to the court that the alleged and pretended order made by said district court of Wagoner county was wholly without any jurisdiction in the premises, and that the alleged petition filed in said court was filed by the defendant H. B. Martin and that the plaintiff acted under the domination, control and influence of the said Martin, and that all that this plaintiff did in and about said matter was done upon the advice and direction of the said H. B. Martin and in full reliance upon said H. B. Martin both as to the legal aspects of the matter and as to the same being for the interest and advantage of this defendant; that neither the district court of Wagoner county nor any other county had any such jurisdiction as a matter of fact, and that the pretended proceedings in said court did not conform to the statute in force in the State of Oklahoma with reference to the removal of disabilities from minors, and that no court could or did in February, 1909, or at any other time, confer upon the plaintiff, who was then a minor, any right or authority whatsoever to transact his business as though of full age, and that the pretended order plead by the defendant is a nullity.

## IV.

For further reply to said answer, the plaintiff states and shows to the court that it is not true as alleged in the answer of said de-

fendant McCullough that prior to the execution of the pretended lease of August 24, 1909, this defendant did not consult and advise with the defendant H. B. Martin and not true that said defendant H. B. Martin had no knowledge of the negotiations pending between plaintiff and this defendant and the defendant Bradshaw until said Martin was called upon to write the contract already theretofore agreed upon; this plaintiff denies that said transactions were conducted on his part of his own free will and choice and upon his own initiative and with full knowledge as to the value of the interests involved in the transaction and the condition of the property and the law governing his rights, and denies that plaintiff had any knowledge or experience in the oil mining business, and denies that the said lease was not at the time of its execution of the market value of more than \$17,000 bonus, and denies that plaintiff had prior to the execution thereof negotiated in the oil and gas

176 mining lease market at and about the city of Tulsa for a long time endeavoring to effect a sale of said lease for the sum of \$10,000 but was unable to find a sale thereof at said price until he succeeded in selling the same to the defendants McCullough and Bradshaw, and denies that said lease was not worth to exceed \$10,000, but states the truth and the fact to be that said lease was worth a bonus of several times that amount, and the plaintiff specifically avers that for many months preceding the 24th day of August, 1909, plaintiff had applied for and received advice from H. B. Martin, one of the defendants herein, with reference to the policy to be pursued in his business transactions and the advisability of the various transactions into which he entered, and that he relied very largely upon the counsel and advice of said Martin, and this the said defendant Martin as well as the other defendants herein well knew; and that on the 24th day of August, 1909, this plaintiff was practically under the complete domination and control of said Martin and so continued for a long time thereafter and until within less than 30 days prior to the filing of the petition in this cause; and that the influence and domination of said Martin over the will of this plaintiff and this plaintiff's reliance upon said Martin not only as a legal adviser but as a friend and business counselor as well, was fully known not only to the said defendant Martin but to the defendants McCullough, Bradshaw and Brown, and all of said defendants relied upon said influence and used the same in furtherance of their unlawful purpose of obtaining plaintiff's property at less than its real value; and plaintiff avers the truth to be that there was a complete understanding between all of the defendants herein prior to the execution of said pretended lease of August 24, 1909.

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V.

For further reply to said answer, the plaintiff denies that it was several days after the execution of the oil and gas mining lease of August 24, 1909, that defendant McCullough learned that plaintiff had theretofore on the 18th day of September, 1909 conveyed by deed of general warranty his title to the lands covered by the lease

to his mother Lizzie Gilcrease, and the circumstances averred in this defendant's answer in regard thereto are not true; that in truth and in fact the deed from plaintiff to his mother, Lizzie Gilcrease was executed on the 18th day of September, 1908 and had been of record for almost a year; and the plaintiff prior to the execution of the lease of August 24, 1909 acquainted the defendant H. B. Martin and the defendant Bradshaw fully with said situation of affairs and explained the circumstances under which said deed to Lizzie Gilcrease was made; but whether he ever stated in so many words to the defendant McCullough those circumstances, he is unable at this time to aver, and this plaintiff denies that it was at his direction that the lease from Lizzie Gilcrease executed on the 4th day of September 1909 was prepared and submitted to said Lizzie Gilcrease upon plaintiff's suggestion and at his direction, but states and shows to the court that the truth and the fact in regard thereto is that said lease was suggested, advised, and prepared by the defendant H. B. Martin, and that the plaintiff exercised no independent will or judgment in regard thereto, and that owing to the influence of said H. B. Martin, he was at the time incapable of executing such independent will or judgment; that Lizzie Gilcrease, the mother of this plaintiff, although possessed of some education, is wholly without business training or experience or judgment, and that she equally with the plaintiff herein relied absolutely upon the defendant H. B. Martin and about said matter and that all of said facts were well known to all of the defendants herein.

## VI.

For further reply to said answer, the plaintiff denies that the defendant A. E. Bradshaw was selected by plaintiff himself to be appointed as special guardian in manner and form as stated in defendant McCullough's answer, and not true as alleged in the separate answer of said defendant McCullough that the county court of Tulsa county was without jurisdiction to appoint A. E. Bradshaw guardian of the plaintiff; that in truth and in fact said county court of Tulsa county did have jurisdiction and was the only court which had or could exercise any such jurisdiction, and that the previous guardianship pending in Muskogee county had long since been terminated and there was no guardian for plaintiff at the time of the appointment of A. E. Bradshaw, and that in all the matters in and about the appointment of A. E. Bradshaw, plaintiff relied implicitly upon the legal advice and business judgment of the defendant H. B. Martin, and that every act and step taken by the plaintiff in said matter was done under the direction of the said H. B. Martin, and none of said acts would have been done or steps taken but for the reliance of plaintiff upon the direction, counsel, and advice of the defendant H. B. Martin both as to the legality thereof and as to their expediency.

## VII.

For further reply to said answer, plaintiff says that it is not true as averred in the separate answer of defendant McCullough that

plaintiff had full knowledge of the value of said lease and that the bonus agreed to be paid by defendants was a fair and adequate consideration, and denies that the bonus of \$17,000 was either a fair or an adequate consideration; that it is not true that defendant McCullough had no knowledge or suspicion of any defect in the validity of said oil and gas mining lease until about the month of July, 1910 when the decision of the Supreme Court in the case of Jefferson vs. Winkler was handed down and promulgated; and it is not true that after plaintiff was informed of said opinion and of its effect or at any other time he stated to the defendant McCullough or to any of the defendants that he did not wish to repudiate his contract or pursue a course of dishonesty towards the defendant; that plaintiff has never at any time desired to pursue a course of dishonesty and has never pursued any such course at any time. That plaintiff was never advised fully of the deception and fraud that had been practiced against him until shortly before the institution of this suit and was never fully advised of his rights in the premises until he sought other counsel than those upon whom he had relied and in whom he had confided up to that time, and  
180       that plaintiff is willing to restore to the defendants and each of them whatever of value, if anything, be found by the court that he has received from them, and is only asking to have restored to him that which they have illegally taken from him and the title to which is now in the plaintiff, and has at all times been in him and to which neither of the defendants have ever at any time had any right or title.

### VIII.

For further reply to said answer, plaintiff says it is not true that pursuant to a purpose declared by plaintiff of carrying out his contract plaintiff began negotiations with defendant to purchase an interest in said contract and thereafter and on the 22nd day of October, 1910 proposed to purchase a one-fourth interest for a consideration of \$15,000 in manner and form as set forth in the answer of the defendant McCullough, but states the truth and the fact to be in regard to the matter as is alleged in plaintiff's petition and not otherwise, and denies that this defendant at plaintiff's special instance and request sold and assigned to the defendant H. B. Martin a one-fourth interest in said contract for an agreed consideration of \$15,000, and further denies that a consideration of \$15,000 or any other consideration was paid by Martin or agreed to be paid, and further denies that it was understood and agreed between plaintiff and defendant McCullough and defendant Martin that the defendant Martin did not have funds to pay the full purchase price and that defendant McCullough should extend credit to defendant Martin for a part of the consideration, and that it is not  
181       true that defendant McCullough accepted the note of the defendant Martin for \$6000 as part of said consideration and assisted Martin to borrow other moneys and funds to enable him to pay the purchase price, and not true that the plain-



tiff knew any or all of such facts, and not true that there were any such facts for the plaintiff either to know or to concur in and consent to; that not only did no such facts in truth exist but that no consideration whatever was ever paid by the defendant Martin for his pretended interest in said leasehold.

## IX.

For a further reply to said answer, the plaintiff denies that he proposed on or about the 8th day of February, 1911, to the defendant H. B. Martin and the defendants G. R. McCullough and A. E. Bradshaw, to enter into a contract of partnership for the purpose of equipping the premises involved in litigation in this suit for oil and gas mining purposes and operating the same so long as oil and gas might be found upon said premises; and that it is not true that the plaintiff ever entered into any contract of co-partnership with said defendants, but that the instrument of writing attached to plaintiff's petition as Exhibit "D" and referred to in defendants' answer, was the only writing or contract entered into and that the same was entered into at the suggestion and instance of the defendant Martin and his co-defendants and while the domination and influence of said defendant Martin still continued and while the plaintiff was still under the complete influence and dominion of the said guardian as to all of the matters

182 pertaining to his business, and that said contract was in truth and in fact, as alleged in plaintiff's petition, but the culminating step in the conspiracy and design formed by the defendants to obtain from the plaintiff the property of the plaintiff for a mere fraction of its real value and to so use the influence of the defendant Martin over said plaintiff as to obtain for said Martin and his co-defendants a large interest in said property without the payment of any real consideration by them or either of them; and the plaintiff denies that said paper writing would constitute a contract of co-partnership even if it were a valid contract at all; and the plaintiff denies that he knew or understood what the relationship of A. E. Bradshaw to the other defendants was or what his share in said contract was to be, or what part he was to play therein until just prior to the institution of this suit, and denies that he, the said plaintiff, was fully advised of the value of his lands and of the mines thereon and of the necessary cost of equipping the same and the probable profits arising from operation thereof; and denies that he was aware of all the laws, statutes and decisions of the courts bearing upon his right, title and interest in said lands; but states the truth and the fact to be that the only knowledge he had of his legal status and of the effect of the said several instruments executed by him was derived from the defendant H. B. Martin, and that each and every of the instruments under and by and through which the defendant Martin and his co-defendants claim in this

183 cause were executed while plaintiff was a minor and legally incapable of executing the same and while he was still under the influence and domination of the said defendant H. B.

Martin and still relied implicitly upon his counsel and advice both as to the legal effect of said matters and as to the best business policy to be pursued by the plaintiff and the expediency of making and entering into said contract, and the plaintiff's reliance upon said Martin and said Martin's influence over him were well known to each of the defendants herein.

#### X.

For further reply to said answer, the plaintiff says that he has not kept the books pertaining to the lease involved in this controversy and has not been kept fully advised of the receipts and expenditures and is not now possessed of sufficient knowledge or information to either affirm or deny the allegations contained in the answer of this defendant with reference to the amount so expended. He admits that the defendants have entered into possession of the premises and that they are still in possession thereof and that so far as he knows, the operations conducted on said premises have been properly conducted, but he denies that the value of said property has been enhanced thereby other than the value of the equipment placed thereon, and states the truth and the fact to be that said lease would have been of the same value under the management of any competent person; and the plaintiff denies that he has at any time after he became acquainted with the facts in regard to the transactions set out in his petition herein, accepted or received

any benefits from this defendant or from any of his co-defendants growing out of said transactions, or done any other  
184 act that in equity will or ought to estop him to deny the validity of any and all of his said pretended leases, contracts and agreements, but that each and every of said leases, contracts, agreements and writings were entered into by this plaintiff while he was still a minor and legally incapable of executing the same and while he was still under the domination of the defendant H. B. Martin and still relied implicitly upon the good faith of said H. B. Martin and upon his ability to advise him correctly as to his legal status and also to counsel him as to the business policy to be pursued and while he was still in ignorance of the true state of facts with reference to said matters and in ignorance of the truth with reference to the relations existing and subsisting between the defendant McCullough and his co-defendants herein.

#### XI.

For further reply to said answer, the plaintiff denying the existence of any partnership contract and denying the existence of any valid contract whatever between this plaintiff and the defendants or either of them, further denies that he has received or withdrawn in cash the sum of \$25,293.45, all of which he still retains, and further denies that he has received any profits from said business since the commencement of this action, and denies that he has ever at any time received anything from the defendants or either of them

185 with full knowledge of all the facts and circumstances and of his legal rights in the premises; that this plaintiff has received since February 11, 1908 from sales of oil taken from the property involved in this controversy approximately \$20,000, but that said moneys so received by him were the proceeds of the sale of oil taken from the premises all of which belonged to the plaintiff, and that the defendants in this action have without right taken more than \$50,000 of the proceeds of said oil and converted the same to their own use and this plaintiff denies that he received in betterments to said property from the defendants, the sum of \$100,000 or any other sum, but states the truth and the fact to be that all of the betterments to said property have been paid for out of the proceeds of the sale of oil produced from said premises now and at all times the property of this plaintiff, and plaintiff avers his willingness to pay to defendants or either of them any sum which the court shall find they have expended for his benefit which they have not already had repaid to them, and this plaintiff further denies that he is or ought to be estopped to have all of his contracts in and about this matter declared void and held for naught.

Wherefore, the plaintiff prays that he have a judgment and decree in this cause against this defendant as prayed for in plaintiff's petition filed herein, and that the court make all such orders and grant all such relief as the facts may warrant and the court shall in equity and good conscience deem proper.

P. C. WEST AND  
BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff.*

186 STATE OF OKLAHOMA,  
*Tulsa County, ss:*

Thomas Gilcrease, of lawful age, being first duly sworn, on his oath states, that he is the plaintiff in the above entitled cause; that he has read the above and foregoing reply to the separate answer of G. R. McCullough, and knows the contents thereof, and that the statements and things therein contained are true.

THOMAS GILCREASE.

Subscribed and sworn to before me this 29th day of July, 1912.

[SEAL.]

W. V. BIDDISON,  
*Notary Public.*

My com. Ex- 11/25/11—11-22-1915.

Endorsements: No. 3125. In the District Court of Tulsa County, Oklahoma. Thomas Gilcrease, Plaintiff, vs. G. R. McCullough et al., Defendant. Reply to Separate Answer of G. R. McCullough. District Court, State of Oklahoma, County of Tulsa. Filed Aug. 7, 1912. W. W. Stuckey, District Clerk. Biddison & Campbell, Attorneys for Plaintiff.

187 And thereupon, on the same day, to-wit: the 7th day of August, 1912, there was filed the reply of the plaintiff to the Separate Answer of the defendant, A. E. Bradshaw, which said reply is in the words and figures following, to-wit:

188 In the District Court of Tulsa County, State of Oklahoma.

No. 3125.

THOMAS GILCREASE, Plaintiff,

VS.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Reply to Separate Answer of A. E. Bradshaw.*

Comes now the plaintiff Thomas Gilcrease by his attorneys Biddison & Campbell and Preston C. West and for his reply to the separate answers of the defendant A. E. Bradshaw filed herein, states:

I.

The he denies all the allegations of said answer other than those allegations which admit the averments of plaintiff's petition.

II.

And for further reply to said answer, the plaintiff denies that he was enrolled by the Commission to the Five Civilized Tribes as of the age of nine years on the 8th day of February, 1899, and avers the truth and the fact to be that he was duly enrolled by said Commission as being nine years of age on the 9th day of June, 1911 and that by said rolls which are made conclusive evidence of his  
189 age by the Act of Congress approved May 27, 1908, the plaintiff did not become twenty-one years of age and did not attain his majority so as to be legally capable of transacting his own affairs and dealing with his allotment until the 9th day of June, A. D. 1911.

III.

Further replying to said answer, the plaintiff denies that he had prior to February, 1909, conducted a store under his own management, and denies that in February, 1909, or at any other time there was ever made and entered any order or decree of the district court of Wagoner county or of any other court, whereby there was granted to plaintiff full right and authority to transact all his business with the same effect as if he had reached the age of twenty-one years or any authority whatsoever to transact any business, but states and shows to the court that the alleged and pretended order made by said

district court of Wagoner county was wholly without any jurisdiction in the premises, and that the alleged petition filed in said court was filed by the defendant, H. B. Martin, and that the plaintiff acted under the domination, control and influence of the said Martin, and that all that this plaintiff did in and about said matter was done upon the advice and direction of the said H. B. Martin and in full reliance upon said H. B. Martin both as to the legal aspects of the matter and as to the same being for the interest and advantage of this defendant; that neither the district court of Wagoner county nor any other county had any such jurisdiction as a matter of fact, and that the pretended proceedings in said court did not conform to the statute in force in the State of Oklahoma with reference to the removal of disabilities from minors, and that no court  
190 could or did in February, 1909 or at any other time, confer upon the plaintiff, who was then a minor, any right or authority what-so-ever to transact his business as though of full age, and that the pretended order plead by the defendant is a nullity.

#### IV.

For further reply to said answer, the plaintiff states and shows to the court that it is not true as alleged in the answer of said defendant Bradshaw that prior to the execution of the pretended lease of August 24, 1909, this defendant did not consult and advise with the defendant H. B. Martin and not true that said defendant H. B. Martin had no knowledge of the negotiations pending between plaintiff and this defendant and the defendant McCullough until said Martin was called upon to write the contract already theretofore agreed upon; this plaintiff denies that said transactions were conducted on his part of his own free will and choice and upon his own initiative and with full knowledge as to the value of the interests involved in the transaction and the condition of the property and the law governing his rights, and denies that plaintiff had any knowledge or experience in the oil mining business, and denies that the said lease was not at the time of its execution of the market value of more than \$17,000 bonus, and denies that plaintiff had prior to the execution thereof negotiated in the oil and gas mining lease market at and about the city of Tulsa for a long time endeavoring to effect a sale of said lease for the sum of \$10,000 but was unable to find a sale thereof at said price until he succeeded in selling the same to the defendants Bradshaw and McCullough, and  
191 denies that said lease was not worth to exceed \$10,000, but states the truth and the fact to be that said lease was worth a bonus of several times that amount, and the plaintiff specially avers that for many months preceding the 24th day of August, 1909, plaintiff had applied for and received advice from H. B. Martin, one of the defendants herein, with reference to the policy to be pursued in his business transactions and the advisability of the various transactions into which he entered, and that he relied very largely upon the counsel and advice of said Martin, and this the said Martin as well as the other defendants herein well knew; and

that on the 24th day of August, 1909, this plaintiff was practically under the complete domination and control of said Martin and so continued for a long time thereafter and until within less than thirty days prior to the filing of the petition in this cause; and that the influence and domination of said Martin over the will of this plaintiff and this plaintiff's reliance upon said Martin not only as a legal adviser but as a friend and business counselor as well, was fully known not only to the said defendant Martin but to the defendants Bradshaw, McCullough and Brown, and all of said defendants relied upon said influence and used the same in furtherance of their unlawful purpose of obtaining plaintiff's property at less than its real value; and plaintiff avers the truth to be that there was a complete understanding between all of the defendants herein prior to the execution of said pretended lease of August 24, 1909.

## V.

192 For further reply to said answer, the plaintiff denies that the defendant A. E. Bradshaw was selected by plaintiff himself to be appointed as special guardian in manner and form as stated in defendant McCullough's answer, and not true as alleged in the separate answer of said defendant Bradshaw that the county court of Tulsa county was without jurisdiction to appoint A. E. Bradshaw guardian of the plaintiff; that in truth and in fact said county court of Tulsa county did have jurisdiction to appoint A. E. Bradshaw guardian of the plaintiff; that in truth and in fact said county court of Tulsa county did have jurisdiction and was the only court which had or could exercise any such jurisdiction, and that the previous guardianship pending in Muskogee county had long since been terminated and there was no guardian for plaintiff at the time of the appointment of A. E. Bradshaw, and that in all the matters in and about the appointment of said A. E. Bradshaw plaintiff relied implicitly upon the legal advice and business judgment of the defendant H. B. Martin, and that every act and step taken by the plaintiff in said matter was done under the direction of the said H. B. Martin, and none of said acts would have been done or steps taken but for the reliance of plaintiff upon the direction, counsel and advice of the defendant H. B. Martin both as to the legality thereof and as to their expediency.

## VI.

For a further reply to said answer, the plaintiff denies that he proposed on or about the 8th day of February, 1911 to the defendant H. B. Martin and the defendant G. R. McCullough and this defendant, to enter into a contract of partnership for the purpose of equipping the premises involved in litigation in this suit for oil and gas mining purposes and operating the same so long as oil, and  
193 gas might be found upon said premises; and that it is not true that the plaintiff ever entered into any contract of copartnership with said defendants, but that the instrument of writing attached



to plaintiff's petition as Exhibit "D" and referred to in defendant's answer, was the only writing or contract entered into and that the same was entered into at the suggestion and instance of the defendant Martin and his co-defendants and while the domination and influence of said defendant Martin still continued and while the plaintiff was still under the complete influence and dominion of the said guardian as to all of the matters pertaining to his business, and that said contract was in truth, and in fact, as alleged in plaintiff's petition, but the culminating step in the conspiracy and design formed by the defendants to obtain from the plaintiff the property of the plaintiff for a mere fraction of its real value and to so use the influence of the defendant Martin over said plaintiff as to obtain for said Martin and his co-defendants a large interest in said property without the payment of any real consideration by them or either of them; and the plaintiff denies that said paper writing would constitute a contract of co-partnership even if it were a valid contract at all; and the plaintiff denies that he knew or understood what the relationship of — to the other defendants was or what his share in said contract was to be, or what part he was to play therein until just prior to the institution of this suit, and denies that he, the said plaintiff, was fully advised of the value of his lands and of the mines thereon,

and of the necessary cost of equipping the same and the probable profits arising from operation thereof; and denies that he was aware of all the laws, statutes and decisions of the courts bearing upon his right, title and interest in said lands; but states the truth and the fact to be that the only knowledge he had of his legal status and of the effect of the said several instruments executed by him was derived from the defendant H. B. Martin, and that each and every of the instruments under and by and through which the defendant Martin and his co-defendants claim in this cause were executed while the plaintiff was a minor and legally incapable of executing the same and while he was still under the influence and domination of the said defendant H. B. Martin and still relied implicitly upon his counsel and advice both as to the legal effect of said matters and as to the best business policy to be pursued by the plaintiff and the expediency of making and entering into said contract, and that the plaintiff's reliance upon said Martin and said Martin's influence over him were well known to each of the defendants herein.

## VII.

For further reply to said answer, the plaintiff says that he has not kept the books pertaining to the lease involved in this controversy and has not been kept fully advised of the receipts and expenditures and is not now possessed of sufficient knowledge or information to either affirm or deny the allegations contained in the answers of this defendant with reference to the amount so expended. He admits that the defendants have entered into possession of the premises and that they are still in possession thereof and that so far as he knows, the operations conducted on said premises

195 have been properly conducted, but he denies that the value of said property has been enhanced thereby other than the value of the equipment placed thereon and states the truth and the fact to be that said lease would have been of the same value under the management of any competent person; and the plaintiff denies that he at any time after he became acquainted with the facts in regard to the transactions set out in his petition herein, accepted or received any benefits from this defendant or from any of his co-defendants growing out of said transactions, or done any other act that in equity will or ought to estop him to deny the validity of any and all of his said pretended leases, contracts, and agreements, but that each and every of said leases, contracts, agreements and writings were entered into by this plaintiff while he was still a minor and legally incapable of executing the same and while he was still under the domination of the defendant H. B. Martin and still relied implicitly upon the good faith of said H. B. Martin and upon his ability to advise him correctly as to his legal status and also to counsel him as to the business policy to be pursued and while he was still in ignorance of the true state of facts with reference to said matters and in ignorance of the truth with reference to the relations existing and subsisting between the defendant Bradshaw and his co-defendants herein.

### VIII.

For further reply to said answer, the plaintiff denying the existence of any partnership contract and denying the existence of any valid contract whatever between this plaintiff and the defendants or  
196 either of them, further denies that he has received or withdrawn in cash the sum of \$25,293.45, all of which he still retains, and further denies that he has received any profits from said business since the commencement of this action, and denies that he has ever at any time received anything from the defendants or either of them with full knowledge of all the facts and circumstances and of his legal rights in the premises; that this plaintiff has received since February 11, 1908 from sales of oil taken from the property involved in this controversy approximately \$20,000 but that said moneys so received by him were the proceeds of the sale of oil taken from the premises all of which belonged to the plaintiff, and that the defendants in this action have without right taken more than \$50,000 of the proceeds of said oil and converted the same to their own use, and this plaintiff denies that he received in betterments to said property from the defendants, the sum of \$100,000 or any other sum, but states the truth and the fact to be that all of the betterments to said property have been paid for out of the proceeds of the sale of oil produced from said premises now and at all times the property of this plaintiff, and plaintiff avers his willingness to pay to defendants or either of them any sum which the court shall find they have expended for his benefit which they have not already had repaid to them, and this plain-

tiff further denies that he is or ought to be estopped to have all of his contracts in and about this matter declared void and held for naught.

Wherefore, the plaintiff prays that he have a judgment and decree in this cause against this defendant as prayed for in plaintiff's petition filed herein, and that the court make all such orders and grant all such relief as the facts may warrant and the court shall in equity and good conscience deem proper.

P. C. WEST AND  
BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff.*

STATE OF OKLAHOMA,  
*Tulsa County, ss:*

Thomas Gilcrease, of lawful age, being first duly sworn, on his oath states:

That he is the plaintiff in the above entitled cause; that he has read the above and foregoing reply to the separate answer of the defendant, A. E. Bradshaw; knows the contents thereof, and that the statements therein contained are true.

THOMAS GILCREASE.

Subscribed and sworn to before me this 29th day of July, 1912.

[SEAL.]

W. V. BIDDISON,  
*Notary Public.*

My com. ex. 11-22-1915.

198 On the back of which Reply, appear the following endorsements, to-wit: No. 3125. In the District Court of Tulsa County, Oklahoma. Thomas Gilcrease, Plaintiff, vs. G. R. McCullough et al., Defendant. Reply to Separate Answer of A. E. Bradshaw. District Court. State of Oklahoma, County of Tulsa. Filed Aug. 7, 1912. W. W. Stuckey, District Clerk. Biddison & Campbell, Attorneys for Plaintiff.

199 And thereupon, on the same day, to-wit: the 7th day of August, 1912, there was filed the reply of the plaintiff to the separate answer of the defendant Al Brown, which said Reply is in the words and figures following, to-wit:

200 STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

In the District Court.

No. 3125.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL  
BROWN, Defendants.

*Reply to Separate Answer of Al Brown.*

Comes now the plaintiff Thomas Gilcrease by his attorneys, Biddison & Campbell and Preston C. West and for his reply to the separate answer of the defendant Al Brown filed herein, states:

I.

That he denies all the allegations of said answer other than those allegations which admit the averments of plaintiff's petition.

II.

And for further reply to said answer, the plaintiff denies that he was enrolled by the Commission to the five Civilized Tribes as of the age of nine years on the 8th day of February 1899, and avers the truth and the fact to be that he was duly enrolled by said Commission as being nine years of age on the 9th day of June, 1911, and that by said rolls which are made conclusive evidence of his age by the Act of Congress approved May 27, 1908, the plaintiff did not become twenty-one years of age and did not attain his majority so as to be  
legally capable of transacting his own affairs and dealing  
201 with his allotment until the 9th day of June, A. D. 1911.

Wherefore, the plaintiff prays that he have a judgment and decree in this cause against this defendant as prayed for in plaintiff's petition filed herein, and that the court make all such orders and grant all such relief as the facts may warrant and the court shall in equity and good conscience deem proper.

P. C. WEST AND  
BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff.*

STATE OF OKLAHOMA,  
Tulsa County, ss:

Thomas Gilcrease, of lawful age, on his oath states: That he is the plaintiff in the above entitled cause; that he has read the above and foregoing reply to the separate answer of the defendant, Al Brown, and knows the contents thereof, and states that the statements therein contained are true.

THOMAS GILCREASE.

Subscribed and sworn to before me this 29th day of July, 1912.

[SEAL.]

W. V. BIDDISON,  
Notary Public.

My com. ex. 11-22-1915.

202-218 On the back of which reply appear the following endorsements, to-wit: No. 3125. In the District Court of Tulsa County, Oklahoma. Thomas Gilcrease, Plaintiff, vs. H. B. Martin et al., Defendant. Reply to separate answer of Al Brown. District Court, State of Oklahoma, County of Tulsa. Filed Aug. 7, 1912. W. W. Stuckey, District Clerk. Biddison & Campbell, Attorneys for Plaintiff.

\* \* \* \* \*

219 In the District Court of Tulsa County, Oklahoma.

No. 3125.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Application to Amend Answer.*

Comes now H. B. Martin, one of the defendants in the above entitled cause, and requests leave to amend his separate answer in the above entitled cause by inserting immediately after the paragraph beginning "And defendant further answering says that plaintiff, Thomas Gilcrease, was not a person without education, business judgment and ability as alleged in said petition," and ending "on or about the — day of February, 1909, assumed the control of all his business affairs and has ever since conducted his business by his own efforts successfully," the following, to-wit:

At the time of executing the lease to G. R. McCullough in said petition set out and contained the said Thomas Gilcrease was more than eighteen years of age, and at the time of executing the working or partnership contract with the defendants, G. R. McCullough,

A. E. Bradshaw and H. B. Martin, in said petition set out and contained said Thomas Gilcrease was, in fact, twenty-one years of age, and being Creek Indian of one-eighth blood, all restrictions against the alienation, use and disposal of said land by the various treaties and acts of Congress in plaintiff's said petition set out, and all other acts of Congress, had been removed under and by virtue of the express terms and provisions of the Act of May 27, 1908, and, so far as the laws of the United States of America are concerned, he had full right, power and authority to lease, or otherwise dispose of the same, and to execute the lease and working or partnership contract in said petition set out and contained, and at the time of executing each of said papers he was a married man, and his disabilities of non-age had prior to the execution of each of said instruments, been removed in accordance with the statute in such cases made and provided, as above stated, and by reason of all the above and foregoing facts he had a good and perfect right to execute said lease and the working or partnership contract in said petition set out and contained, and a good and perfect right to lease said lands as he did so lease them, or to otherwise dispose of the same; and such lease so made, and said working, drilling or partnership contract, were not violative of any provision of any treaty or agreement with the United States of America with the Creek (or Muskogee) Tribe or Nation of Indians, or any law of the United States governing or regulating the affairs of said Tribe or Nation of Indians, or regulating and controlling the disposition of the lands belonging to said Nation or Tribe, or any individual member thereof, and that by virtue of said Act of May 27, 1908, the said Thomas Gilcrease was given the same power, authority and right to deal with and lease, sell and dispose of, or otherwise to use said land as if, in fact, he were not of Indian blood and said land had never been subject to the rules and regulations of the Department of the Interior, and as if no restrictions against the alienation thereof, or the power of Thomas Gilcrease to deal with, control and manage the same, had ever been imposed thereon, or on the said Thomas Gilcrease, and said Act of Congress of May 27, 1908 repeals Sec. 17 of the Supplemental Agreement, and Sec. 4 of the Original Creek Agreement, and Sections 1 and 2 of the Act of Congress of April 28, 1904, and Sections 19 and 20 of the Act of Congress of April 26, 1906, set out in the plaintiff's petition herein, in so far as said treaties and acts of Congress affect or control the lands set out and described in the petition herein, or constitute a restriction against the alienation or other disposal of said land.

STUART, CRUCE & CRUCE,  
H. B. MARTIN,

*Attorneys for Defendants.*

Endorsements: Number 3125. Thomas Gilcrease, Plaintiff, vs. G. R. McCullough et al., Defendants. Application to Amend answer. District Court, State of Oklahoma, county of Tulsa. Filed Apr. 3, 1913. In open court. W. W. Stuckey, Clerk.



222 And thereupon, on the same day, to-wit: the 3d day of April, 1913, there was filed the Application of the defendant G. R. McCullough to amend his separate answer filed herein, which said application is in the words and figures following, to-wit:

223 In the District Court of Tulsa County, Oklahoma.

Number 3125.

THOMAS GILCREASE, Plaintiff,

VS.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Application to Amend Answer.*

Comes now G. R. McCullough, one of the defendants in the above entitled cause, and requests leave to amend his separate answer in the above entitled cause by inserting immediately after the paragraph beginning "And defendant further answering says that plaintiff, Thomas Gilcrease, was not a person without education, business judgment and ability as alleged in said petition," and ending "On or about the — day of February, 1909, assumed the control of all of his business affairs and has ever since conducted his business by his own efforts successfully," the following, to-wit:

At the time of executing the lease to G. R. McCullough in said petition set out and contained, the said Thomas Gilcrease was more than eighteen years of age, and at the time of executing the working or partnership contract with the defendants, G. R. McCullough, A. E. Bradshaw and H. B. Martin, in said petition set out and contained said Thomas Gilcrease was, in fact, twenty-one years of age, and, being a Creek Indian of one-eighth blood, all restrictions

224 against the alienation, use and disposal of said land by the various treaties and acts of Congress in plaintiff's said petition set out, and all other acts of Congress, had been removed under and by virtue of the express terms and provisions of the Act of May 27, 1908, and, so far as the laws of the United States of America are concerned, he had full right, power and authority to lease, or otherwise dispose of the same, and to execute the lease and working or partnership contract in said petition set out and contained, and at the time of executing each of said papers he was a married man, and his disabilities of non-age had, prior to the execution of each of said instruments, been removed in accordance with the statute in such cases made and provided, as above stated, and by reason of all the above and foregoing facts he had a good and perfect right to execute said lease and the working or partnership contract in said petition set out and contained, and a good and perfect right to lease said lands as he did so lease them, or to otherwise dispose of the same; and such lease so made, and said working drilling or partnership contract, were not violative of any provision of any treaty or agreement with

the United States of America, with the Creek (or Muskogee) Tribe or Nation of Indians, or any law of the United States governing or regulating the affairs of said Tribe or Nation of Indians, or regulating and controlling the disposition of the lands belonging to said Nation or Tribe, or any individual member thereof, and that by virtue of said act of May 27th, 1908, the said Thomas Gilcrease was given the same power, authority and right to deal with and  
225 lease, sell and dispose of, or otherwise to use said land as if, in fact, he were not of Indian blood and said land had never been subject to the rules and regulations of the Department of the Interior, and as if no restrictions against the alienation thereof, or the power of Thomas Gilcrease to deal with, control and manage the same, had ever been imposed thereon, or on the said Thomas Gilcrease, and said Act of Congress of May 27, 1908, repeals Sec. 17 of the Supplemental Agreement, and Sec. 4 of the Original Creek Agreement, and Sections 1 and 2 of the Act of Congress of April 28, 1904, and Sections 19 and 20 of the Act of Congress of April 26, 1906, set out in the plaintiff's petition herein, in so far as said treaties and acts of Congress affect or control the lands set out and described in the petition herein, or constitute a restriction against the alienation or other disposal of said land.

STUART, CRUCE AND CRUCE,  
H. B. MARTIN,

*Attorneys for Defendants.*

Endorsements: Number 3125. Thomas Gilcrease, Plaintiff, vs. G. R. McCullough et al., Defendants. Application to Amend Answer. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 3, 1913. In Open Court. W. W. Stuckey, Clerk.

226 And thereupon, on the same day, to-wit: the 3d day of April, 1913, there was filed the application of the defendant, A. E. Bradshaw to amend his separate answer filed herein which said Application is in the words and figures following, to-wit:

227 In the District Court of Tulsa County, Oklahoma.

Number 3125.

THOMAS GILCREASE, Plaintiff,

VS.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants.

*Application to Amend Answer.*

Comes now A. F. Bradshaw, one of the defendants in the above entitled cause, and requests leave to amend his separate answer in the above entitled cause by inserting immediately after the paragraph

beginning "And defendant further answering says that plaintiff, Thomas Gilcrease, was not a person without education, business judgment and ability as alleged in said petition," and ending "on or about the — day of February, 1909, assumed the control of all of his business affairs and has ever since conducted his business by his own efforts successfully" the following, to-wit:

At the time of executing the lease to G. R. McCullough in said petition set out and contained the said Thomas Gilcrease was more than eighteen years of age, and at the time of executing the working or partnership contract with the defendants, G. R. McCullough, A. E. Bradshaw and H. B. Martin, in said petition set out and contained said Thomas Gilcrease was, in fact, twenty-one years  
228 ago, and being a Creek Indian of one-eighth blood, all restrictions against the alienation, use and disposal of said land

by the various treaties and acts of Congress in plaintiff's said petition set out, and all other acts of Congress, had been removed under and by virtue of the express terms and provisions of the Act of May 27, 1908, and, so far as the laws of the United States of America are concerned, he had full right, power and authority to lease, or otherwise dispose of the same, and to execute the lease and working or partnership contract in said petition set out and contained, and at the time of executing each of said papers he was a married man, and his disabilities of non-age had, prior to the execution of each of said instruments, been removed in accordance with the statute in such cases made and provided, as above stated and by reason of all the above and foregoing facts he had a good and perfect right to execute said lease and the working or partnership contract in said petition set out and contained, and a good and perfect right to lease said lands as he did so lease them, or to otherwise dispose of the same; and such lease so made, and said working, drilling or partnership contract, were not violative of any provisions of any treaty with the United States of America with the Creek (or Muskogee) Tribe

or Nation of Indians, or any law of the United States govern-  
229 ing or regulating the affairs of said Tribe or Nation of Indians, or regulating and controlling the disposition of the lands belonging to said Nation or Tribe, or any individual member thereof, and that by virtue of said Act of May 27, 1908, the said Thomas Gilcrease was given the same power, authority and right to deal with and lease, sell and dispose of, or otherwise to use said land as if, in fact, he were not of Indian blood and said land had never been subject to the rules and regulations of the Department of the Interior, and as if no restrictions against the alienation thereof, or the power of Thomas Gilcrease to deal with, control and manage the same, had ever been imposed thereon, or on the said Thomas Gilcrease, and said Act of Congress of May 27, 1908, repeals Sec. 17 of the Supplemental Agreement, and Sec. 4 of the original Creek Agreement and Sections 1 and 2 of the Act of Congress of April 28, 1904, and Sections 19 and 20 of the Act of Congress of April 26, 1906, set out in the plaintiff's petition herein, in so far as said treaties and acts of Congress affect or control the lands set out and described in the

petition herein, or constitute a restriction against the alienation or other disposal of said land.

STUART, CRUCE & CRUCE,  
H. B. MARTIN,

*Attorneys for Defendants.*

230 & 231 On the back of which application to amend answer appears the following endorsements, to-wit: Number 3125. Thomas Gilcrease, Plaintiff, vs. G. R. McCullough et al., Defendants. Application to Amend Petition. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 3, 1913. In Open Court. W. W. Stuckey, Clerk.

\* \* \* \* \*

232-268

No. 3125.

THOMAS GILCREASE, Plaintiff,

vs.

G. R. McCULLOUGH et al., Defendants.

Now upon application the defendants herein are by the court given leave to amend answer instanter in certain particulars as is set out in application of defendants duly filed.

\* \* \* \* \*

269 By the Court: Call your witnesses.

By Mr. West: Plaintiff desires to introduce a certified copy of the enrollment of the plaintiff Thomas Gilcrease showing his age and degree of blood.

By Judge Diggs: To which we object as incompetent, irrelevant and immaterial, and for the further reason that the same is not certified to as required by law or by the officer having in charge the rolls of the Five Civilized Tribes.

By Mr. Biddison: The general objection of incompetency we ask to be made specific under the statute, in what particular it is incompetent other than that.

By Judge Diggs: We say it is incompetent for the reason it is not signed by an officer or properly certified by an officer having charge of the records, that the handwriting of Mr. Wright or the clerk signing it has not been identified, that the officer having charge and control of the original records of the Five Civilized Tribes is the Secretary of the Interior or the Indian Commissioner at Washington.

270 Mr. Biddison: That becomes a question of law and is determined by the fact that the Commissioner to the Five Civilized Tribes has the official custody of the original rolls.

Mr. West: And J. George Wright is the successor by operation of law to the original commission consisting of four people.

Mr. Cruce: We are required to set out our entire objection now, are we?

Mr. Biddison: That is the demand of the plaintiff under the statute.

Mr. Cruce: Our objection to the competency is that the record does not show the age of this man; the further objection is it is incompetent for the reason it is not the character of testimony or character of records of the Dawes Commission by which you can prove the age; it is the kind of testimony to prove the degree of blood but not the age.

The Court: Proceed with the rest of the testimony, I will reserve my ruling on that; I have some doubt about it.

Mr. West: I now offer in evidence the original patent or allotment deed to the surplus portion, 120 acres, of the land in question, executed by P. Porter as principal chief of the Creek Nation, approved by Thomas Ryan, Acting Secretary of the Interior.

The Court: How much does that cover?

Mr. West: 120 acres.

271 Mr. Biddison: What is known as the surplus over and above the forty acres of the homestead.

Which said patent was marked Plaintiff's Exhibit B., and is in the words and figures following, to-wit:

272 PL'FF'S Ex. B. 3125.

*Allotment Deed.*

Creek Indian Roll No. 1505.

Muskogee (Creek) Nation,

Indian Territory.

To all whom these presents shall come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats. 831), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, it was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Thomas Gilcrease, a citizen of said tribe, as an allotment, exclusive of a forty acre homestead, as aforesaid,

Now, therefore, I, The undersigned, the Principal Chief of the

Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Thomas Gilcrease all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

The South Half of the Northwest Quarter, and the Northeast Quarter of the Southwest Quarter of Section Twenty-two (22) Township Seventeen (17) North, and Range Twelve (12) East of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twenty (120) acres, more or less, as the case may be, according to the United States Survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 25th day of August, 1902.

[SEAL.]

P. PORTER,  
*Principal Chief of the Muskogee (Creek) Nation.*

L. R. S.

Department of the Interior.

Approved December 15, 1902.

THOMAS RYAN,  
*Acting Secretary.*

Endorsements: 51544. Indian Office Incl. No. 279, 1902. Department of the Interior. Nov. 29, 1902. Returned with No. —. Inclosure Ind. Ter. Div. B. Commission No. 1283. Al-  
274 lotment Deed. Muskogee (Creek) Nation to Thomas Gilcrease. Filed for record on the 24 day of December, 1902, at 1 o'clock P. M., and recorded in Book 2 Page 35. Commission to the Five Civilized Tribes. Tams Bixby, Acting Chairman. File No. 635.

275 Mr. West: Plaintiff offers a similar patent to the forty acre or homestead tract, being the remainder of the land in question, identified as Exhibit C.

Which said patent so offered and received in evidence is in the words and figures following, to-wit:



276

PL'F's Ex. C. 3125.

*Homestead Deed.*

Creek Indian Ro. No. 1505.

The Muskogee (Creek) Nation,  
Indian Territory.

To all whom these presents shall come, Greeting:

Whereas, by the Act of Congress approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

Whereas, it was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

Whereas, the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Thomas Gilcrease, a citizen of said tribe, as a homestead.

277 Now therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said Thomas Gilcrease all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:

The North West Quarter of the South West Quarter of Section Twenty-two (22), Township Seventeen (17) North, and Range Twelve (12) East,

of the Indian Base and Meridian, in Indian Territory, containing Forty (40) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also to provisions of said Act of Congress relating to the use devise and descent of said land after the death of the said Thomas Gilcrease and subject also to all provisions of said Act of Congress relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In witness whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 25th day of August, 1902.

278

P. PORTER,

*Principal Chief of the Muskogee (Creek) Nation.*

L. R. S.

Department of the Interior.

Approved December 15, 1902.

[SEAL.] THOS. RYAN,  
*Acting Secretary.*

Endorsements: Indian Office. 51544. 1902. Incl. No. 278. Department of the Interior Nov. 29, 1902. Returned with No. — Inclosure Ind. Ter. Div. C. Commission No. 1282. Homestead Deed. Muskogee (Creek) Nation to Thomas Gilcrease. Filed for record on the 24 day of December 1902, at 1 o'clock P. M. and recorded in Book B. page 35. Commission to the Five Civilized Tribes. Tams Bixby, Acting Chairman. File No. 635.

279 Mr. West: We offer in evidence the copy of the contract of August 24, 1909, attached to the original petition in this case, No objection being made to the use of the copy that is attached to the bill instead of the original contract itself.

Which said copy so offered and received in evidence was marked Plaintiff's Exhibit D., and is in the words and figures following, to-wit:

280

## EXHIBIT A.

*Oil and Gas Mining Lease.*

This agreement, made this 24th day of August, 1909, by and between Thomas Gilcrease, Party of the first part, and Grant R. McCullough, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of Seventeen Thousand (\$17,000.00) Dollars, the receipt of which is hereby acknowledged, and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased and does by these presents grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns all the oil and gas in and under that certain tract of land hereinafter described and also all the said tract of land hereinafter described for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa county, State of Oklahoma, and described as follows, to-wit:

The South Half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the

North Half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-Two (22), Township Seventeen (17) North of Range Twelve (12) East of the Indian Meridian, containing 160 acres.

The said party of the first part grants the further privilege unto the party of the second part, his heirs, successors and assigns of using sufficient water and gas from the premises necessary to the operations thereon and all rights and privileges necessary or  
281 convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time, machinery or fixtures placed on the premises by said party of the second part.

To have and to hold the same unto the said party of the second part, his heirs, successors and assigns, for the term of fifteen years and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The terms of this lease to begin at the time of the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thoias Gilcrease, to William H. Milliken, and the said term of this lease shall run for fifteen years thereafter and as long thereafter as oil and gas is being produced as aforesaid.

In consideration whereof the said party of the second part agrees to deliver to the party of the first part, in tanks or pipe lines, the one eighth ( $\frac{1}{8}$ ) part of all oil produced and saved from the leased premises. And should gas be found on said premises in paying quantities, said party of the second part agrees to pay One Hundred (\$100.00) Dollars yearly, for the product of each gas well while the same is being sold off the premises, but the party of the second part shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

All rentals and other payments may be made directly to the party of the first part or may be deposited to his credit at the Bank of Oklahoma in the city of Tulsa.

All the conditions and terms of this grant and lease shall  
282 extend to and be binding upon the heirs, successors and assigns of the parties hereto.

In witness whereof, we have hereunto set our hands this 24th day of August, 1909.

THOS. GILCREASE,

*Party of the First Part.*

GRANT R. McCULLOUGH,

*Party of the Second Part.*

283 STATE OF OKLAHOMA,  
County of Tulsa, ss:

On this 24th day of August, 1909, before me, A. B. Davis, a Notary Public in and for said county and State, personally appeared Thomas Gilcrease, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to

me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal, this 24th day of August, 1909.

[SEAL.]

A. B. DAVIS,  
*Notary Public.*

My commission expires November 26, 1911.

Filed for record in Tulsa, Okla., Aug. 25, 1909, at 4 o'clock P. M.

[SEAL.]

H. C. WALKLEY,  
*Register of Deeds.*

STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

I, H. C. Walkley, Register of Deeds in and for the county and State above named, do hereby certify that the foregoing is true and correct copy of a like instrument now of record in my office and recorded in Book 70, page 11.

Dated the 19th day of Feb. 1912.

H. C. WALKLEY,  
*Register of Deeds.*

284 And thereupon court took an adjournment until this afternoon at one-thirty.

Thursday, April 3d, 1913—1:30 p. m.

Court met pursuant to adjournment.

Present: Same as before.

Mr. Biddison: With reference to the roll card that was introduced this morning.

The Court: I will let it go in for what it is worth.

Objection overruled.

Judge Diggs: Exception.

Which said Exhibit A., so offered and received in evidence is in the words and figures following, to-wit:

285-293

PL'FF's EX. A. 3125.

Department of the Interior,

Commissioner to the Five Civilized Tribes.

*Creek Roll, Citizens by Blood.*

Number.	Name.	Age.	Sex.	Blood.	Card No.
1505	Gilcrease, Thomas (Age Nine)	9	M.	1/8	456

This is to certify, that I am the officer having custody of the approved roll of Creek citizens by blood of the Creek Nation and that

the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 1505 enrolled as of June 9, 1899.  
P. O. Leonard, Oklahoma.

J. B. WRIGHT,  
*Commissioner to the Five Civilized Tribes,*  
By T. C. HUMPHRY, JR.,  
*Clerk in Charge of Creek Records.*

C. H. DREW, *Clerk.*

Muskogee, Oklahoma, February 3, 1912.

\* \* \* \* \*

294 Mr. West: Plaintiff now offers in evidence lease from Lizzie Gilcrease to Grant R. McCullough, that is to say, the copy of that lease attached to the petition filed in this case, the same having been executed on the 4th day of September, 1909.

The Court: No objection being made on account of it being a copy?  
Judge Diggs: No, sir.

The Court: In introducing these documents, is there any thing as you go along that you desire to call to the attention of the court, any of the language or any part of it particularly?

Mr. West: This lease, is, as I stated to your Honor this morning, an adoption, as we understand it, of the lease already made by the boy to these people, the legal title at that time standing in the name of his mother.

Which said lease so offered and received in evidence is in the words and figures following to-wit:

295

# EXHIBIT B.

## *Oil and Gas Mining Lease.*

This indenture, made and entered into on the 4th day of September, 1909, by and between Lizzie Gilcrease, party of the first part, and Grant R. McCullough, party of the second part,

Witnesseth: That said party of the first part, for and in consideration of the sum of One (\$1.00) Dollar, and other good and valuable considerations, the receipt of which is hereby acknowledged and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased, and does by these presents, grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns, all the oil and gas in and under the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa county, State of Oklahoma, and described as follows, to-wit:

The South One-half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North One-half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section

Twenty-two (22) Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and meridian, containing one hundred and sixty (160) acres more or less.

The said party of the first part grants the further right and privilege unto the party of the second part, his heirs, successors and assigns, of using sufficient water and gas from the premises  
 296 necessary to the operation thereon, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time, machinery or fixtures placed on the premises by the said party of the Second Part.

To have and to hold the same unto the said party of the second part, his heirs, successors and assigns, for the term of Fifteen (15) years, and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, and the said term of this lease shall run for fifteen (15) years and as long thereafter as oil or gas is being produced as aforesaid.

The consideration named in a certain lease upon the aforesaid lands heretofore executed on the 24th day of August 1909 by Thomas Gilcrease, to the said Grant R. McCullough, consisting of a bonus of Seventeen Thousand (\$17,000.00) dollars, and a royalty of one-eighth ( $\frac{1}{8}$ ) of the oil to be produced from said land as a part of the consideration of this lease: And the said party of the first part, Lizzie Gilcrease, hereby adopts, ratifies and confirms the said lease from Thomas Gilcrease to the said Grant R. McCullough.

All conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

In witness whereof, we have hereunto set our hands this  
 297 4th day of September, 1909.

LIZZIE GILCREASE,

*Party of the First Part.*

GRANT R. McCULLOUGH,

*Party of the Second Part.*

STATE OF OKLAHOMA,

*County of Tulsa, ss:*

On this 4th day of September, 1909, before me, a Notary Public in and for said county and State, personally appeared Lizzie Gilcrease to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal this 4th day of September, 1909.

[SEAL.]

C. W. GILLETT,

*Notary Public.*

My Commission expires April 12, 1912.



Filed for record at Tulsa, Okla., Sep. 7, 1909 at 10:50 o'clock  
A. M.  
[SEAL.]

H. C. WALKLEY,  
*Register of Deeds.*

STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

I, H. C. Walkley, register of deeds, in and for the county and State above named, do hereby certify that the foregoing is a true and correct copy of a like instrument now of record in my office and recorded in book 70 page 168.

Dated the 14 day of Feb. 1912.

[SEAL.]

H. C. WALKLEY,  
*Register of Deeds.*

298 Mr. West: Plaintiff now desires to offer in evidence copy of the deed of September 18, 1908 from Thomas Gilcrease to Lizzie Gilcrease for the land involved in this controversy.

Which said deed so offered and received in evidence is in the words and figures following, to-wit:

299 PL'F's Ex. E. 3125.

*Warranty Deed.*

Know all men by these presents: That Thomas Gilcrease of Wealaka, Oklahoma, party of the first part, in consideration of the sum of Five Thousand (5000) Dollars (\$5,000.00) in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto Lizzie Gilcrease, of Wealaka, Oklahoma, the following described real property and premises, situated in Creek county, State of Oklahoma, to wit:

The South half of the northwest Quarter and the north half of the southwest quarter of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian.

This deed is made subject to an oil and gas mining lease executed by William L. Gilcrease, as guardian of the grantor herein, to W. H. Milliken as lessee, and it is expressly understood and agreed that all royalties arising under said lease from the production of oil and gas on said land are reserved to said Thomas Gilcrease, the grantor in this deed, and shall be paid to him together with all the improvements thereon and the appurtenances thereunto belonging, and warrant the title to the same.

To have and to hold said described premises unto the said party of the second part, her heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature.

300

Signed and delivered this 18th day of September, 1908.

THOMAS GILCREASE. [SEAL.]

*Acknowledgment.*

STATE OF OKLAHOMA,  
*Muskogee County, ss:*

Before me, a Notary Public in and for said county and State, on this 18th day of September, 1908, personally appeared Thomas Gilcrease to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and seal as such notary public on the day last above mentioned.

GARFIELD JOHNSON,  
*Notary Public.*

My commission expires December 28, 1909.

301      Endorsements: Warranty Deed. Thomas Gilcrease, Wealaka, Okla., to Lizzie Gilcrease, Wealaka, Okla.

302      Mr. West: Plaintiff now offers a declaration of trust attached to the copy of the deed just put in evidence stating that she holds the same for Thomas Gilcrease.

Judge Diggs: To which we object as incompetent, irrelevant and immaterial, its execution not proven.

Mr. West: I will admit, Your Honor, its execution is not proven at this time; if they will call for formal proof of that I will have to withdraw it. I will withdraw that offer at this time.

Plaintiff now offers in evidence the assignment of a one-fourth interest in the oil and gas mining lease of the 24th of August, 1909, from Gilcrease to McCullough, the assignment now offered being dated the 22d day of October, 1910, and purporting to assign a one-fourth interest in the lease of August 24th, 1909, from McCullough back to Gilcrease.

Which said assignment so offered and received in evidence is in the words and figures following, to-wit:

303                      PL'F's Ex. F. 3125.

*Assignment of Oil and Gas Mining Lease.*

Know all men by these presents:

That I, Grant R. McCullough, in consideration of the sum of fifteen thousand (\$15,000.00) Dollars, to me in hand paid, the receipt whereof is hereby acknowledged, have sold, assigned, trans-

ferred and set over, and by these presents do sell, assign, transfer and set over unto W. T. Gilcrease of the city of Tulsa, Oklahoma, his heirs, successors and assigns, to his proper use and benefit, the undivided one-fourth ( $\frac{1}{4}$ ) interest in and to a certain indenture of lease, dated the 24th day of August, 1909, made by Thomas Gilcrease to me, the said Grant R. McCullough, and the undivided one-fourth of my interest in and to a certain indenture of lease, dated the 4th day of September, 1909, made by Lizzie Gilcrease, to me, the said Grant R. McCullough; that is to say, a certain oil and gas mining lease executed as aforesaid by the said Thomas Gilcrease to the said Grant R. McCullough upon the following described lands, to-wit:

The South Half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North Half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22) Township Seventeen (17) North of Range Twelve (12) East of the Indian Meridian, containing One Hundred and Sixty acres, more or less;

lying, situate and being in the county of Tulsa and state of Oklahoma. And a certain oil and gas mining lease executed as aforesaid by the said Lizzie Gilcrease to the said Grant R. McCullough upon the aforesaid tract of land.

To have and to hold the same unto the said W. T. Gilcrease his heirs, successors and assigns, for and during all of the terms of the said lease defined therein, to-wit: the period of fifteen (15) years, and as long thereafter as oil and gas may be produced, to begin upon the cancellation or expiration of a certain oil and gas mining lease hereto fore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, upon said land.

In witness whereof, I have hereunto set my hand on this 22nd day of October, 1910.

GRANT R. McCULLOUGH, *Grantor*.

STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

On this 22nd day of October, 1910, before me, Roscoe Adams, a Notary Public in and for said county and State, personally appeared Grant R. McCullough, to me known to be the identical person who executed the foregoing indenture of assignment, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein named.

In witness whereof, I have hereunto set my hand and affixed my notarial seal on this 22nd day of October, 1910.

[SEAL.]

ROSCOE ADAMS,  
*Notary Public*.

My commission expires June 6, 1914.

305 Endorsements: F. Grant R. McCullough to W. T. Gilcrease. Assignment of Oil and Gas Mining Lease.

306 Mr. West: I would like the record to show defendants admit in open court that on the same date as the assignment from McCullough to Gilcrease of a one fourth interest, McCullough also executed a like assignment to the defendant H. B. Martin of a one-fourth interest.

Mr. Martin: That is admitted.

Mr. West (continuing): Of the lease of August 24, 1909, being in substantially the same terms and for a like consideration,—purporting to be for a like consideration. Plaintiff now offers in evidence a copy of the assignment executed by H. B. Martin to Thomas Gilcrease of December 11th, 1911, of an undivided three fourths of all his right, title and interest in and under the lease of August 24, 1909, from Gilcrease to McCullough. Any objection to that?

Mr. Martin: No.

Which said copy of assignment so offered and received in evidence is in the words and figures following to-wit:

307

EXHIBIT E.

Know all men by these presents:

That for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations, the undersigned H. B. Martin, has bargained, sold released and assigned, and does by these presents bargain, sell, release and assign unto Thomas Gilcrease, of Tulsa, Oklahoma, his heirs, administrators and assigns, an undivided three-fourths ( $\frac{3}{4}$ ) of all the rights, title and interest derived, had and held by the said H. B. Martin in and to the oil and gas mining right upon the following described real property, to-wit:

The South one-half (S./2) of the Northwest Quarter (N. W./4) and the North One-half (N./2) of the Southwest Quarter (S. W./4) of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, in the county of Tulsa and State of Oklahoma, under and by virtue of a certain contract of mining lease executed between the said Thomas Gilcrease, G. R. McCullough and the said H. B. Martin, on the 8th day of February, 1911; it being the intent of this assignment to convey to the said Thomas Gilcrease all rights, title, interest and privilege of the said H. B. Martin in the aforesaid contract of lease so far as the same affects the said undivided three-fourths interest of the said H. B. Martin.

It is further covenanted and contracted that the assignee, Thomas Gilcrease, assumes all obligations of the said H. B. Martin as to the said three-fourths interest, as to the expense of operating and equipping said leased premises.

308 In Witness whereof, I have hereunto set my hand, this 11th day of December, 1911.

(Signed)

H. B. MARTIN.

STATE OF OKLAHOMA,  
County of Tulsa, ss:

Before me, Guy L. Reed, a Notary Public within and for said county and State on this 11th day of December, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the above and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

[SEAL.]

GUY L. REED,  
Notary Public.

My Commission expires Aug. 21, 1912.

309 Mr. West: Plaintiff now offers in evidence copy of the contract of February 8th, 1911, entered into between Thomas Gilcrease, the plaintiff, G. R. McCullough and H. B. Martin, two of the defendants in this cause, the copy offered being attached to the original petition on file in this case.

Which said contract so offered and received in evidence is in the words and figures following, to-wit:

310 *Contract.*

This indenture, made and entered into this 8th day of February, 1911, by and between Thomas Gilcrease, G. R. McCullough and H. B. Martin,

Witnesseth: That for and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their respective heirs, administrators and assigns, shall have and hold, in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:

The South one-half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North one-half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22) Township Seventeen (17) North, Range Twelve (12) East of the Indian Meridian, in the county of Tulsa, and State of Oklahoma, as long as oil and gas, or either of them, are found upon said premises in paying quantities.

The said Thomas Gilcrease shall receive as royalty for said leases premises, one eighth ( $\frac{1}{8}$ ) of all the oil mined and saved upon said premises, delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil, upon demand of the said Thomas Gilcrease. And in addition to said royalty, the said Thomas Gilcrease, his heirs, executors and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said property;

the said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half ( $\frac{1}{2}$ ) of the leasehold interest in said land; and the said H. B. Mar-

tin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said land.

And it is further contracted, covenanted and agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date as long as oil and gas is found thereon in paying quantities, and that after the payment of the royalty hereinbefore provided for to the said Thomas Gilcrease, that all of the balance of the proceeds of the oil produced from said leased premises, less necessary operating expenses, shall be applied to the payment of the cost of equipment of said lease until such equipment shall have been fully paid for out of said proceeds.

And it is further contracted, covenanted and agreed that the equipment now upon said leased premises, and hereafter to be placed upon said leased premises, shall be and remain the personal property of the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their heirs, executors, and assigns, in the proportion of the interests of said parties in said leasehold, as evidenced by this contract.

And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casing, or any other

312 portion of said equipment from any wells upon said leased premises, as long as oil is produced from said wells in paying quantities, but that when such wells shall become exhausted and no longer produce oil in paying quantities, then such equipment may be removed by said parties hereto, their heirs, administrators and assigns.

And it is further covenanted and contracted that the expense of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest of the said Thomas Gilcrease shall not be liable for any of the expense of the equipment or operation of said lease, and shall be free from any expense whatever.

In witness whereof, We have hereunto set out hands this 8th day of February, 1911.

THOMAS, GILCREASE.  
G. R. McCULLOUGH.  
H. B. MARTIN.

STATE OF OKLAHOMA,  
County of Tulsa, ss:

Before me, Benjamin C. Connor, a Notary Public in and for said County and State on this 8th day of February, 1911, personally appeared Thomas Gilcrease, G. R. McCullough and H. B. Martin, to me known to be the identical persons who executed the foregoing instrument, and acknowledged to me, each for himself, that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.



In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[SEAL.]

BENJAMIN C. CONNOR.

My commission expires March 29, 1911.

313 Mr. West: Plaintiff now offers in evidence contract of employment as attorney entered into between Thomas Gilcrease and H. B. Martin on the 21st day of April, 1910.

Which said contract so offered and received in evidence, is in the words and figures following, to-wit:

314 PL'F's EX. G. 3125.

*Contract.*

This contract, made and entered into on this 21st day of April, 1910, by and between Thomas Gilcrease, party of the first part and H. B. Martin, party of the second part.

Witnesseth: That this contract is made to take the place of and supersede a certain contract heretofore entered into on the 1st day of February, 1909, by and between Thomas Gilcrease and the firm of Hainer & Martin, and

It is contracted and agreed that the said H. B. Martin will take charge of and prosecute to the best of his skill and ability certain actions now pending as follows, to-wit:

A certain action in which the said Thomas Gilcrease is plaintiff and George C. Butte et al. are defendants now pending in the district court of Muskogee county, State of Oklahoma, and a certain other action in which the said Thomas Gilcrease is plaintiff and one William H. Millikin is defendant, now pending in the district court of Tulsa county, State of Oklahoma. That in the said case of Gilcrease vs. Butte, that the compensation of the said H. B. Martin shall be 10% of whatever sum so recovered and collected in said cause whether by judgment or compromise, and that the said H. B. Martin shall pay out of said commission his personal expenses in attending to said cause and that the compensation of the said H. B. Martin, for his services in the case of Gilcrease vs. Millikin, shall be 7  
315 and ½ per cent of all sums of money collected from the said William H. Millikin and the other defendants in said cause, on account of the royalties for which said suit is prosecuted. And 7 and ½ per cent of all damages which may be recovered and collected in said cause.

It is further contracted and agreed that the said H. B. Martin shall represent the said Thomas Gilcrease in whatever litigation he may be a party for a period of one (1) year from the date of this contract, and that the compensation to be paid for such services shall be the reasonable value of the same to be agreed upon between the parties hereto at the time.

It is further agreed that a retainer fee of \$200.00, the receipt

whereof is hereby acknowledged, shall be and is paid by the said party of the first part to the party of the second part, and that such retainer fee covers all services to be rendered, consultation, advice, examination of abstracts, and preparations of deeds and other papers and all other services of a legal nature which may be required by the said party of the first part of the said party of the second part during the term of this contract, except, the prosecution and defense of suits in court.

Provided, however, that the said H. B. Martin, is to charge no commission upon such royalties as are admitted and paid without contest by the said William H. Millikin and — Colley, accruing upon said oil and gas lease from this date.

316 In Witness Whereof, We have hereunto set our hands this 21st day of April, 1910.

THOMAS GILCREASE,  
*Party of the First Part.*

H. B. MARTIN,  
*Party of the Second Part.*

317 THOMAS GILCREASE, called as a witness in his own behalf, having been first duly sworn was examined in chief by Mr. West, and testified as follows:

Q. What is your name?

A. Thomas Gilcrease.

Q. Are you the plaintiff in this action?

A. Yes, sir.

Q. Where do you live, Mr. Gilcrease?

A. Tulsa.

Q. What is your mother's name?

A. Lizzie Gilcrease.

Q. Are you familiar with Lizzie Gilcrease's signature, your mother's signature?

A. Yes, sir.

Q. I will ask you to look at the paper I am showing you and tell me whose signature is attached to the slip that is pasted?

A. That is my mother's.

Q. Mr. Gilcrease, the slip to which I called your attention is attached to a copy of a deed from you to Lizzie Gilcrease of Wealaka, Oklahoma, and executed on the 18th day of September, 1908. Is that Lizzie Gilcrease who signed the slip that is pasted onto that deed and the signature on which you have just identified, the same Lizzie Gilcrease as the person who is named as grantee in the deed?

A. Yes, sir.

Q. Is the date of the execution of that slip that is pasted onto that deed the true date?

A. So far as I know.

Q. With reference to the making of the deed, was it made at or about the time of the making of the deed or at some other time?

A. That slip there?

Q. Yes.

318 A. Mr. Butte of Muskogee made that, he made the deed and the slip too; he gave it to me and I had my mother to sign it.

Q. Were they executed at about the same time?

A. At the same time.

Mr. West: Plaintiff now offers in evidence the written slip attached to Exhibit E, Exhibit E being a copy of the deed from Thomas Gilcrease to Lizzie Gilcrease heretofore introduced in evidence, and asks that said declaration of trust of Lizzie Gilcrease be admitted in evidence in this cause and properly identified by the stenographer.

Judge Diggs: To which we object as incompetent, irrelevant and immaterial, not having been recorded, no notice of its existence shown to have come to the knowledge of these defendants prior to the execution of any of the instruments introduced in evidence.

The Court: Overruled.

Judge Diggs: Exception.

Which said slip, so offered and received in evidence was marked Exhibit H. and is in the words and figures following, towit:

PL'F'S EX. H. 3125.

I hereby declare and make known that I hold in trust for Thomas Gilcrease whatever title is conveyed to me by a certain Warranty Deed dated September 18, 1908, a copy of which is hereto attached.

Witness my hand this 19th day of September, 1908.

LIZZIE GILCREASE.

Q. Mr. Gilcrease, whose signature is that appended to the paper I am showing you?

A. That is my mother's.

319 Q. Is that the same Lizzie Gilcrease that you made the deed to in September of 1908 that we have just been talking about?

A. Yes, sir.

Q. The same Lizzie Gilcrease who signed that declaration of Trust that you have just been asked about?

A. Yes, sir.

Mr. West: Plaintiff now offers in evidence quit claim deed from Lizzie Gilcrease to the plaintiff in this case Thomas Gilcrease, executed on the 6th day of March, 1911.

Judge Diggs: No objection.

Which said quit claim deed so offered and received in evidence, was marked Exhibit I, and is in the words and figures following, to-wit:

*Quit Claim Deed.*

This indenture, made this 6th day of March, in the year A. D. 1911, between Lizzie Gilcrease of Tulsa county, Okla. of the first part, and Thomas Gilcrease of Tulsa county, Okla. of the second part.

Witnesseth: That the said party of the first part in consideration of the sum of One dollar *Dollars* to — duly paid the receipt whereof is hereby acknowledged, *do I* hereby quit claim, grant, bargain, sell and convey unto the said party of the second part, and to his heirs and assigns, forever, all — right, title, interest and estate, both at law and in equity, of, in and to the following described real estate situated in the county of Tulsa and State of Oklahoma to-wit:

South one half ( $\frac{1}{2}$ ) of the Northwest Quarter ( $\frac{1}{4}$ ) and the North half ( $\frac{1}{2}$ ) of the Southwest Quarter ( $\frac{1}{4}$ ) of Section 22, Township 17, Range 12 East, containing one hundred and sixty acres,

Together with all and singular the hereditaments and appurtenances thereunto belonging. To have and to hold the above granted premises unto the said party of the second part his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set her hand the day and year first above written.

LIZZIE GILCREASE.

321 STATE OF OKLAHOMA,  
*County of Tulsa, ss:*

Before me, J. F. Paulter, a Notary Public in and for said county and State on this 6th day of March, 1911, personally appeared Lizzie Gilcrease, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that she executed the same as her free and voluntary act and deed for the uses and purposes therein set forth.

Witness my hand and notarial seal the day and year above set forth.

[SEAL.]

J. F. PAULTER,  
*Notary Public.*

My commission expires June 14, 1914.

322 Endorsements: Quit Claim Deed by Lizzie Gilcrease, Leonard, Okla., to Thomas Gilcrease, Tulsa, Oklahoma.

STATE OF OKLAHOMA,  
Tulsa County, Tulsa, Okla.:

I hereby certify that this instrument was filed for record in my office on Mar. 8, 1911 at 9:50 o'clock A. M. and is duly recorded in Record 83, Page 224.

[SEAL.]

H. C. WALKLEY,  
*Register of Deeds.*

22-17-12.

HAINER & MARTIN.

323 Q. When you executed the deed to this land to your mother in September, 1908, did she pay you any consideration for it?

A. No, sir.

Q. Was it executed for the purpose of conveying to her—

Judge Stuart: We object to that, asking him what it was executed for because he is the plaintiff in the case.

Mr. West: Strike out that question.

Q. How came you to execute that deed, Mr. Gilcrease, and what was its purpose?

A. That was some few months after I had married, so Mr. Butte, they wanted to find out whether or not I could sell any of my property or not, whether I could convey good title to my property, and he executed the deed and had me sign it, to my mother.

Q. Who was Mr. Butte?

A. He was my father's attorney there to Muskogee.

Q. What was your father's name?

A. W. L. Gilcrease.

Q. Was he acting at that time in the capacity of guardian to you?

A. Yes, sir, he was guardian for me.

Q. Go ahead and state what the understanding was as to how your mother should hold that title and for whose benefit?

A. That is all; it was executed for to find out whether or not I could convey title to my property or not; I was going to have some kind of a test trial on it or something.

Q. What was the understanding between you and your mother?

A. That is all the understanding was; she was just to hold the property for me to see whether or not I could convey the property.

Q. For you?

A. Yes, she was just holding it for me.

324-361 Q. Did she have any personal property interest in it herself?

A. No, sir.

Q. And never paid you anything for it?

A. No, sir.

Q. Is she the same Lizzie Gilcrease who executed the lease to McCullough that has been introduced in evidence in this case?

A. Yes, sir.

Q. I notice that some of these assignments that were made to you are made to W. T. Gilcrease, did you ever go by that name, Tom?

A. No, I always went by the name of just Tom.

A. Are you the man who was intended to be named in those instruments?

A. Yes, sir.

Q. Do you know how they happened to have W. T. Gilcrease in them?

A. No, I don't, only just the name was just William Thomas Gilcrease.

Q. That was your full name?

A. Yes, sir, that was my full name.

Q. You have usually adopted a short form and called yourself Thomas Gilcrease?

A. Yes, sir.

Q. Your full name was then in fact William Thomas Gilcrease?

A. Yes, sir.

Q. Those papers were executed and delivered to you and you are the man to whom McCullough and Martin assigned the interest in this lease we have up here, are you?

A. Yes, sir.

Q. How long have you been living in Tulsa, Mr. Gilcrease?

A. About four years and a half.

Q. About what date was it you came up here to live?

A. Well, it was—it must have been along in December of 1908.

\* \* \* \* \*

362 Q. Tom, what was your actual age when you came to Tulsa from down there.

A. Eighteen.

Q. What was your birthday, what year were you born in, and what date?

A. On the 8th day of February, 1890.

\* \* \* \* \*

363-422 Cross-examination.

By Mr. Martin: :

Q. Tom, you are married?

A. Yes, sir.

Q. When were you married?

A. In August 19—I believe I was married in August, 1908.

Q. How old are you now, according to your computation?

A. I was twenty three years old the 8th day of last February.

Q. You have a family, wife and children?

A. Yes, sir.

\* \* \* \* \*



423-549 Q. I will show you a paper and ask you to look at it and tell me what that is?

A. That is a lease from John Archer to myself and Mr. Martin.

Q. Is that the date that appears on this lease as the date of its execution the date when it was actually executed?

A. It seems as though to me there was another lease. There was another lease on there at the time that hadn't been cancelled or something.

Q. What I am talking about is whether the date that is on this paper is the date it was actually executed to you and Mr. Martin?

A. Yes, sir.

Q. That is the first lease you and Mr. Martin had?

A. That is the first lease I ever had in my life.

Mr. West: Plaintiff offers in evidence a lease from John W. Archer to W. T. Gilcrease and H. B. Martin, dated November 2d, 1910.

Mr. Martin No objection.

Which said lease so offered and received in evidence, is in the words and figures following, to-wit:

\* \* \* \* \*

550 Department of the Interior.

Commissioner to the Five Civilized Tribes.

*Creek Roll, Citizens by Blood.*

No.	Name.	Age.	Sex.	Blood.	Card No.
		9			
1505	Gilcrease, Thomas (Age nine)		M.	1/8	456

This is to certify that I am the officer having custody of the approved roll of Creek citizens by blood of Creek Nation and that the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 1505, enrolled as of June 9, 1899. P. O. Leonard, Oklahoma.

J. G. WRIGHT,

*Commissioner to the Five Civilized Tribes.*

C. D. Drews, Clerk, Muskogee, Oklahoma, April 3, 1913.

551 Mr. West: Plaintiff now offers in evidence certified copy of the enrollment record on file in the office of the Commissioner to the Five Civilized Tribes pertaining to the enrollment of the plaintiff, Thomas Gilcrease, and certified by J. G. Write, Commissioner to the Five Civilized Tribes.

Judge Diggs: To which we object as being incompetent, irrelevant and immaterial and not shown that the certificate is made by the officer having custody and control of the original records.

Mr. Cruce: Let me add one objection to that: That the plaintiff having proven by the plaintiff himself that he was twenty-one years of age on the 8th day of February, 1911 and not claiming that they were surprised at that testimony they cannot now contradict their own witness by record testimony.

Mr. Biddison: We are not asking to do that by that, if the court please, we are asking to prove the limitation fixed by the Act of Congress when he became capacitated to handle his land and the proof of his actual age goes to his capacity and competency, not legal competency but his actual capacity, business capacity, to transact business, which is a competent matter for the court to consider in connection with the other facts and circumstances of the case to show the youth, experience, and so forth, but as to the legal disability the roll that is under Congressional Act as fixing the time before which he could not dispose of his property, we introduce this evidence not for the purpose of showing the actual age, Congress cannot change a man's age as a fact as our Supreme Court has said and as the Federal Court -as said, the Congress could not by Act make a man twenty-one years of age who was not 21 years of age, but they can prescribe a limitation and did so in that act fixing the time at which he could handle his allotment. They could do that and did do it.

The Court: Same ruling.

Which said enrollment record, so offered and received in evidence is in the words and figures following to-wit:

(Here follows enrollment record marked page 553.)

*[Handwritten signature]*

in this office in so far as the same pertain to the  
enrollment of Thomas Gilcrease Creek & bend,  
Roll no. 505.

APR 3 - 1919

*J. G. Wright*  
Commissioner to the Five Civilized Tribes

[illegible]

\* \* \* \* \*

554-925      Thereafter, at the October, 1915, Term of said Supreme Court, on the 21st day of December, 1915, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

vs.

G. R. McCULLOUGH et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded with directions to cancel the lease of the plaintiff in error, Thomas Gilcrease, to Grant R. McCullough, date August 24, 1909; and the lease of Lizzie Gilcrease to Grant R. McCullough of September 5, 1911; and the lease of Thomas Gilcrease to H. B. Martin and G. R. McCullough of February 8, 1911; and the assignment of H. B. Martin to G. R. McCullough of March 24, 1911; and for further proceedings not inconsistent with the opinion herein. Opinion by Brett, C.

By the Court: It is so ordered, the opinion herein is hereby adopted in whole, and judgment is entered accordingly.

926      Thereafter, On January 5, 1916, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

vs.

G. R. McCULLOUGH et al.

And now on this Jan. 5, 1916, it is ordered by the court that the mandate of this court in the above cause be stayed pending petition for rehearing, and the petition for rehearing is transferred to the Supreme Court for investigation.

927      Thereafter, at the January, 1916, Term of said Supreme Court, on the 29th day of February, 1916, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

vs.

G. R. McCULLOUGH et al.

And now on this day it is ordered by the court that the above cause be set for oral argument at the April, 1916, term; and petition for rehearing is hereby granted.

928      Thereafter, at the April, 1916, Term of said Supreme Court, on the 21st day of April, 1916, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

VS.

G. R. McCULLOUGH et al.

And now on this day the above cause is argued orally and the cause is submitted, and it is ordered by the court that permission be granted to print petition for rehearing.

929      Thereafter, at the October, 1916, Term of said Supreme Court, on the 10th day of October, 1916, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

VS. ..

G. R. McCULLOUGH et al.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Turner, J. All the Justices concur except Kane, C. J., absent and not participating.

930      Filed Oct. 10, 1916. Wm. M. Franklin, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 5773.

THOMAS GILCREASE, Plaintiff in Error,

VS.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants in Error.

*Syllabus.*

1. In a suit to set aside an oil and gas mining lease, dated August 24, 1909, on the ground that it was procured by fraud and while plaintiff was a minor and hence was void under the Act of May 27, 1908; to prove his minority at that time plaintiff introduced in evidence the census card showing that he was 9 years old on the date of his enrollment. At the

lower right-hand corner of the card appeared: "June 9/99"; Held: That as there was nothing on the face of the card to show such was the date of his application for enrollment, the card was without probative force to prove that plaintiff was 9 years old on that date.

2. For the purpose of proving his quantum of Indian blood to be one-eighth, plaintiff introduced in evidence a certified copy of the Approved Rolls of the Creek Citizens by Blood of the Creek Nation, showing his quantum of Indian blood to be one-eighth. In the certificate thereto was the statement: "Enrolled as of June 9, 1899." Held: That such statement was no part of the record certified and was without probative force to prove the date of plaintiff's application for enrollment.
3. In a suit to set aside an oil and gas mining lease for fraud in its procurement and while plaintiff was a minor in violation of the Act of May 27, 1908, where the enrollment records fail to disclose the date of enrollment of plaintiff, but the undisputed parol evidence shows him to have been born February 8, 1890 and hence was a minor on August 24, 1909, the date of the execution of the lease; evidence examined and held: That the court was right in finding there was no fraud in its procurement but that, aside from the question of fraud, the lease was in violation of the Act and not voidable but void.
4. Where a minor citizen of the Creek Nation of one-eighth Indian blood during his minority executes a lease upon his allotment, without the intervention of the county court and void as in contravention of the Act of May 27, 1908, and after attaining his majority, without fraud in its procurement and for a valuable consideration, executes another lease on the same land to the same party and others interested in the prior lease for a like term, held: That the subsequent lease is good and that the court did not err in refusing to set the same aside.
5. Under Act May 27, 1908, c. 199, sec. 3 (35 Stat. 313) providing that the enrollment records of the Commission to the Five Civilized Tribes shall be conclusive evidence as to the age of an enrolled citizen or freedman; assuming that we can take judicial notice that "June 9/99" appearing on the lower right-hand corner of the enrollment record was the date of plaintiff's enrollment and that he was 9 years old on that date, such is only conclusive that on said date he had passed his ninth birthday and had not yet reached his tenth, and does not prove that he was a minor on February 8, 1911, the date of the lease sought to be set aside on the ground of minority, which was 4 months and one day less than twelve years thereafter.



Error from the District Court of Tulsa County.

A. H. Huston, Judge.

Affirmed.

Biddison & Campbell, Attorneys for Plaintiff in Error.  
James B. Diggs, Attorney for Defendants in Error.  
Of Counsel: Henry McGraw and Rush Greenslade.

Opinion of the Court by TURNER, J.:

On February 12, 1912, in the district court of Tulsa county, plaintiff in error, Thomas Gilcrease, an enrolled citizen of the Creek Nation, alleged to be of one-eighth Indian blood, sued G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown to set aside an oil and gas mining lease made, executed and delivered by plaintiff to McCullough, dated August 24, 1909, on his 160 acre allotment in the Creek Nation. The petition alleged not only fraud on the part of all the defendants in its procurement, but that plaintiff was a minor at the time and hence the lease was void. He also alleged that since that time all the defendants, save Bradshaw, while he

was yet a minor, still conspiring to defraud him, to-wit: 932 on February 8, 1911, procured from him a contract in writing to explore the demised premises for oil and gas, which he likewise assails for fraud and prays that both lease and contract be set aside and held for naught, and that defendants be required to account for all the oil mined while in possession thereunder and for a receiver, and for general relief.

After separate answers filed, in effect a general denial, there was trial to the court who held, in effect, that plaintiff was a minor at the time he executed the lease sought to be set aside, but whether void or voidable on that account, said lease was expressly adopted by plaintiff after he had reached his majority by the execution of the contract sought to be set aside, and rendered and entered judgment in favor of defendants.

The court was right in holding that plaintiff was a minor at the time of the execution of the lease. To maintain this issue plaintiff introduced in evidence, over objection, a certified copy of the census card for the purpose of showing that plaintiff was 9 years old on the date of his enrollment. At the lower right-hand corner of the card appears the following: "June 9/99"; and, it is contended that, as there is nothing on the face of the card to show that this was the date of application for enrollment, the card is without probative force to prove that plaintiff was 9 years old on that date. Following is the card:

(Here follows enrollment card marked page 933.)

Department of the Interior  
Commissioner to the Five Civilized Tribes

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the lands of said tribes, and that the above and foregoing is a true and correct copy of the enrollment records on file

in this office in so far as the same pertain to the  
enrollment of Thomas Hilerman, Creek by blood,  
Roll No. 1505

MUSKOGEE, OKLAHOMA

APR 3 - 1913

*Handwritten initials*

*Handwritten signature*  
Commissioner to the Five Civilized Tribes

Enrollment		NAME		AGE		BLOOD		TOTAL ENROLLMENT		DATE OF NAME		DATE OF ENROLLMENT		NAME OF ENROLLMENT		DATE OF NAME		DATE OF ENROLLMENT	
1505	1	Thomas Hilerman	1505	1	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1506	2	Thomas Hilerman	1506	2	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1507	3	Thomas Hilerman	1507	3	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1508	4	Thomas Hilerman	1508	4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1509	5	Thomas Hilerman	1509	5	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1510	6	Thomas Hilerman	1510	6	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1511	7	Thomas Hilerman	1511	7	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1512	8	Thomas Hilerman	1512	8	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1513	9	Thomas Hilerman	1513	9	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1514	10	Thomas Hilerman	1514	10	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1515	11	Thomas Hilerman	1515	11	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1516	12	Thomas Hilerman	1516	12	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1517	13	Thomas Hilerman	1517	13	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1518	14	Thomas Hilerman	1518	14	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1519	15	Thomas Hilerman	1519	15	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1520	16	Thomas Hilerman	1520	16	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1521	17	Thomas Hilerman	1521	17	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1522	18	Thomas Hilerman	1522	18	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1523	19	Thomas Hilerman	1523	19	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4
1524	20	Thomas Hilerman	1524	20	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4	1/4

*Handwritten note:*  
Enrollment of Thomas Hilerman, Creek by blood, Roll No. 1505

*Handwritten note:*  
This is a copy of the enrollment of Thomas Hilerman, Creek by blood, Roll No. 1505, as it appears in the original records of the Five Civilized Tribes.

CREEK NATION CREEK ROLL

*Handwritten initials*

Roll No. 456  
456

934 The point is well taken.

In *McDonald v. Holland*, 230 Fed. 945, the fact was that before the date located as here on the card, but long after the card had been made out, some one had written: "date of application for enrollment," and, as the same was not questioned, such the court took said date to be. But here, where it is questioned and it is insisted that such date, standing alone, is without probative force to prove that such was the date of application for enrollment, we are bound to hold the objection well taken since we cannot take judicial notice that such date was intended to evidence the date of application for enrollment. And further, since there was no parole evidence introduced to show that such was, in point of fact, the date of application for enrollment but there was uncontroverted evidence to show that plaintiff was born February 8, 1890, the court did not err when he re-*con*-ed plaintiff's age from the latter date and held that plaintiff was a minor when he, on August 24, 1909, executed the lease sought to be set aside. And he certainly did not err for the reason that, re-*con*-ed from either date, plaintiff was a minor on the date in question.

For the purpose of proving his quantum of Indian blood to be one-eighth, plaintiff also introduced in evidence this "card":

"Department of the Interior,

Commissioner to the Five Civilized Tribes.

*Creek Roll, Citizens by Blood.*

Number.	Name.	Age.	Sex.	Blood.	Card.
1505	Gilcrease, Thos.	(Age 9)9	M.	1/8	456.

This is to certify that I am the officer having custody of the approved roll of Creek citizens by blood of the Creek Nation and that the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 1505 enrolled as of June 9, 1899, P. O. Leonard, Oklahoma.

J. G. WRIGHT,

*Commissioner to the Five Civilized Tribes."*

Which, appearing as it does to be a certified copy of the "approved roll," was sufficient proof for that purpose for the reason that the Act of May 27, 1908 makes the "rolls of citizenship" conclusive evidence as to the quantum of Indian blood as distinguished from the "enrollment records," which it makes conclusive evidence as to the age of the plaintiff.

935 But the recitation "enrolled as of June 9, 1899," contained in the certificate to this card of the Commissioner to the Five Civilized Tribes was not sufficient to prove that "June 9, 1899" was the date of plaintiff's enrollment. This was held in *Jackson v. McGilbray*, 148 Pac. 703. There the court said:

"Plaintiff introduced in evidence a portion of the Creek freed-man roll, to-wit:

'Department of the Interior, Commissioner to the Five Civilized Tribes. Creek Freedman Roll No. 852, name, McGilbray, Clarence; age (age nine) 9; sex, M.; census card No. 239.'

accompanied by the following certificate:

"This is to certify that I am the officer having custody of the approved roll of Creek freedmen, and that the above and foregoing is a true and correct copy of that portion of said roll appearing at No. 852 enrolled as of August, 1898, P. O. Lee, Oklahoma.

J. G. WRIGHT,

*'Commissioner to the Five Civilized Tribes,*  
By C. S. PITTS, *Clerk.'*

"\* \* \* No date appears in this record itself showing when it was compiled. The age of the allottee, Clarence McGilbray, is unquestionably shown therein to be nine years at some time not stated. When was he nine years old? When did he reach his majority? These dates it is impossible to determine from the record itself. The court evidently, and necessarily, resorted to, and relied upon, the certificate of the custodian of such records in making its findings and arrived at the conclusion that the allottee was a minor on July 1, 1910, but was of full legal age one month later.

"The copy of the portion of the enrollment records offered in evidence is incomplete, and, independently of the certificate of the official in charge thereof, is insufficient to prove age. The office of the certificate is to attest the correctness of that part of the record which is exemplified, and is evidence thereof; but it is no part of such record, nor is it evidence of any fact not appearing in the record proper. As evidence of the fact that it was made in August, 1898, or that the allottee named therein was enrolled as of August, 1898, it was incompetent and without probative force or effect."

The court was also right in holding there was no fraud in the procurement of the instruments assailed. Upon this point there is no material conflict in the testimony. The evidence discloses that plaintiff was a citizen of the Creek Nation of one-eighth Indian blood, was born February 8, 1890, and was married and the owner of the allotment in question. Sometime in 1896 his father, acting as his guardian, leased this tract of land for oil and gas mining purposes to one Milliken for 15 years for a bonus of \$17,000 and a royalty of one-eighth, who took possession under the lease and bored some forty or more producing wells thereon. There-  
936 after in February, 1909, the district court of Wagoner county, pursuant to the prayer of his petition, rendered and entered a decree purporting to remove plaintiff's disability of minority and confer upon him his rights of majority; (and which it was presumed to do until it was held in *Truskett v. Closser*, 236 U. S. 549 (1915) that such decree was void) whereupon his father was discharged as guardian and plaintiff managed his own affairs. That same year plaintiff moved to Tulsa, where he met the defendant Martin for the first time and whom he shortly thereafter retained

generally as his attorney. While Martin was acting as such, trouble arose between plaintiff and Milliken over the royalty payable to plaintiff, which, when the amount thereof was ascertained, Milliken paid to the Indian Agent who refused to turn it over to plaintiff on account of his minority, whereupon defendant Bradshaw was appointed his special guardian in April, 1910, for the purpose of receiving the same, which he did, and immediately turned the money over to Gilcrease and was entitled to be discharged. In the summer of 1909, plaintiff, in view of the fact that the Milliken lease would soon expire, wanted to sell another lease on the land, to take effect upon the expiration of the Milliken lease and run for another term of 15 years and offered to take \$10,000 bonus therefor. Hearing this, the defendant Bradshaw asked him what bonus he was receiving from Milliken and plaintiff answering \$17,000, Bradshaw said: "I suppose you will take the same amount for another lease?" to which plaintiff replied that he would. This conversation took place while they were both viewing the leasehold; after which they returned to Tulsa where plaintiff called next day at the bank, of which Bradshaw was cashier and the defendant McCullough was president and informed Bradshaw that he was ready to close the deal. After closing the deal, which was talked over between plaintiff, Bradshaw and McCullough, on request of plaintiff they went to the office of defendant Martin who was requested by plaintiff 937 to draw up the papers. This he did by drawing a lease from plaintiff McCullough, dated August 24, 1909, for a recited cash bonus of \$17,000 and a one-eighth royalty, the same to commence at the expiration of the Milliken lease and run for a term of 15 years, or for so long as oil or gas was found in paying quantities. As to the \$17,000 bonus it was agreed between plaintiff and McCullough that \$2,000 be paid in cash, which was done, and \$500 every ninety days thereafter until McCullough took possession of the demised premises; at which time the balance of the bonus was to be due and payable. After the execution of these instruments and after the \$2,000 cash had been paid, it was discovered that prior thereto plaintiff had conveyed the land in trust to his mother, whereupon McCullough demanded that the title be cleared whereupon plaintiff requested the defendant Martin, his attorney, to secure a like lease from his mother to McCullough, which he afterwards did, believing at the time the lease from plaintiff to McCullough to be good.

Under the terms of the Milliken lease, Milliken, at the expiration of his lease, was obligated to leave the casing in all producing wells, but was permitted to remove the other equipment and also the casing from non-producing wells.

This provision in said lease left it "a gamble" as to the probable value of the property for oil production after the expiration of his lease. And such value was rendered more doubtful, owing to the fact that, as a result of ill feeling between plaintiff and Milliken, the latter had declared that he did not want to lease the property after his lease had expired for the reason it would be of no value as an oil property, and, to render it so, exerted himself to destroy it

as such by shooting the wells with charges of explosives many times too large in order to exhaust the oil so as to render them non-producing and thereby afford him the right to remove the casing and other equipment from the property at the expiration of his lease. Thus matters stood at the time of the execution of the lease in question from plaintiff to McCullough, at which time the amount  
938 of bonus which would be fair to pay for it varied, in the opinion of the witnesses who testified on that point, from \$200,000 to \$15,000; while others testified that the value of the lease was a pure gamble and not a marketable proposition at all. And thus matters stood for about a year thereafter, at which time, as only a few months intervened until McCullough had the right to take possession under his lease and oil, in the meantime, had greatly advanced in price and the condition of the wells was such as to justify the presumption of indefinitely continued profitable production and hence the property had greatly appreciated in value, plaintiff approached McCullough to buy back from him a fourth interest in the lease. It might be well to pause here and say that the evidence reasonably tends to prove that the bonus paid for this lease was a fair one under all the circumstances, and that there is a total absence of fraud in the procurement of said lease.

The negotiations which followed resulted, on October 22, 1910, in the assignment by McCullough to plaintiff a one-fourth interest in the lease for \$15,000, and also an assignment of McCullough to Martin of a one-fourth interest therein for a like amount. And as McCullough, since the making of the lease of August 24, 1909, has paid plaintiff \$4,000 of the consideration therefor, leaving a balance due plaintiff of \$13,000 plaintiff paid for the one-fourth interest so purchased, by taking credit for his payment of said \$13,000 and by paying \$2,000 in cash. Martin purchased his one-fourth interest in the lease at the request of plaintiff and settled for it in a way not necessary here to state but which was perfectly fair; and, as it was satisfactory to McCullough, no one else need complain. On February 8, 1911, the day the Milliken lease expired and plaintiff reached his majority, plaintiff, McCullough and Martin made and entered into the following:

939

*"Contract.*

"This Indenture, made and entered into this 8th day of February, 1911, by and between Thomas Gilcrease, G. R. McCullough and H. B. Martin,

Witnesseth: That for and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, R. G. McCullough and H. B. Martin, their respective heirs, administrators and assigns shall have and hold in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:

The south one-half ( $\frac{1}{2}$ ) of the northwest quarter ( $\frac{1}{4}$ ) and the



north one-half ( $\frac{1}{2}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22) Township Seventeen (17) North, Range Twelve (12) east of the Indian Meridian, in the county of Tulsa and State of Oklahoma, as long as oil and gas, or either of them, are found upon said premises in paying quantities.

The said Thomas Gilcrease shall receive as royalty for said leased premises one-eighth ( $\frac{1}{8}$ ) of all the oil mined and saved upon said premises, delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil, upon demand of the said Thomas Gilcrease. And in addition to said royalty, the said Thomas Gilcrease, his heirs, executors and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said property; the said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half ( $\frac{1}{2}$ ) of the leasehold interest in said land; and the said H. B. Martin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said land.

And it is further contracted, covenanted and agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date as long as oil and gas is found thereon in paying quantities, and that after the payment of the royalty hereinbefore provided for to the said Thomas Gilcrease, that all of the balance of the proceeds of the oil produced from said leased premises, less necessary operating expenses shall be applied to the payment of the cost of equipment of said lease until such equipment shall have been fully paid for out of said proceeds.

And it is further contracted, covenanted and agreed that the equipment now upon said leased premises, and hereafter to be placed upon said leased premises, shall be and remain the personal property of the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their heirs, executors and assigns, in the proportion of the interests of said parties in said leasehold, as evidenced by this contract.

And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casings or any other portion of said equipment from any wells upon said leased premises, as long as oil is produced from said wells in paying quantities, but that when such wells shall become exhausted, and no longer produce oil in paying quantities, then such equipment may be removed by said parties hereto, their heirs, administrators and assigns.

And it is further covenanted and contracted that the expenses of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest of the said Thomas Gilcrease shall not be liable for any of the expenses of the equipment or operation of said lease, and shall be free from any expenses whatever.

In witness whereof, we have hereunto set our hands this 8th day of February, 1911.

THOMAS GILCREASE.  
G. R. McCULLOUGH.  
H. B. MARTIN."

(Then follows the acknowledgment of all the parties.)

940 While the evidence fails to disclose just what interest the defendants Bradshaw and Brown have in said lease, it does disclose that whatever that may be the same is included in the one-half interest of McCullough. It further shows that soon after the execution of said contract the parties thereto took possession of the premises therein described, but before they could produce oil, were compelled to replace that part of the equipment which Milliken had removed in the way of pumps, apparatus, power, rods, casing, etc., after which they proceeded to operate the property under said contract and to market the oil produced. It seems that this new equipment was obtained at a cost of some \$60,000, and mostly upon the credit of McCullough, through arrangements with supply companies and eventually paid for by installments out of the proceeds of the sale of oil, after which operating expenses were paid and the remainder divided among the parties as their respective interests appear in the contract. It also seems that such production was considerable, as a result of which operations were conducted upon the basis mentioned up to the time this suit was brought,—the pipe line company paying the parties in interest for the oil upon division orders signed by them which, when obtained, they turned back into a fund out of which was paid the operating expenses and the installments due upon the equipment. In July following, the defendant Martin, in the presence and with the knowledge of plaintiff in settlement with his law partner, extinguished his partnership claim to the interest of Martin in the contract for \$12,500. On December 11, 1911, plaintiff and Martin had a general settlement of their affairs, whereupon Martin assigned to plaintiff three-fourths of his one-fourth interest in the premises. And thus matters stood at the time this suit was brought.

From all of which we fail to see any fraud whatever in the procurement of either or both of the instruments assailed. Certainly there is nothing upon which to base the charge that the defendant

941 Martin was guilty of fraud and of over-reaching his client from start to finish. He was the mere scrivener in preparing the lease of August 24, 1909 and that to at the request of Gilcrease. Although he was at that time his attorney under general retainer, he was not consulted as to the advisability of executing the lease, much less as to the fairness of the bonus to be paid therefor. All parties in interest thereto made the agreement thereby expressed without his knowledge, much less by his advice. His sole connection with that matter was to reduce the lease to legal form, which he did, believing that plaintiff was competent to enter into the contract. And such it seems was the belief, generally, among lawyers until

Jefferson v. Winkler, 26 Okl. 653, was decided. Nor is there any evidence that his subsequent interest in the property was acquired other than in good faith and for value.

We also fail to see that a fiduciary relation existed between Bradshaw as special guardian for plaintiff at the time of the execution of said lease or the subsequent contract. This for the reason that if such relation arose out of the fact of the qualification of Bradshaw as special guardian in April, 1910, for the purpose of receiving royalties due plaintiff from the Indian Agent, such relation had not arisen at the time of the execution of the lease and had long since ceased to exist at the time of the execution of the contract by the performance of the trust.

All that can fairly be said concerning the circumstances of these transactions is that here is a minor, the owner of certain oil lands of doubtful value, subject to a lease of 15 years about to expire. He has received a sum certain as a bonus for the existing lease and offers to lease the land again for the same bonus for the same purpose and for the same term and to any one who will buy. The original lessee would not have it and intended to remove his equipment from the leasehold at the expiration of his term, thereby necessitating a re-equipment of the wells at a cost of thousands of dollars by a subsequent lessee in order to render them producers. He does so by the lease of August 24, 1909, to take effect at the expiration of the prior lease; and, so far as we can see, drives  
942 a good bargain. As the end of the existing term approaches and oil goes up and production increases and he sees the value of the lease appreciate, he goes to the second lessee and seeks to buy back an interest in the lease. Although he has not taken possession under his lease or expended a dollar thereon, the second lessee had the right to set his own price on his property and accordingly priced a one-fourth interest in the lease at precisely what the minor had sold the whole lease for. He was within his rights and the minor had a right to accept or reject it. He accepted; and, having theretofore received \$4,000 of the bonus agreed to be paid for the lease, paid the \$15,000 for a fourth interest in the lease by foregoing the \$13,000 and by paying \$2,000 as stated. This may or may not have been wise on his part. With that we have no concern. His subsequent re-investments in the lease may also not have been wise. With those we have no concern. It is sufficient to say we see, perhaps folly but no fraud in any of them. We see further that this minor, now that he has reacquired, aside from a royalty of one-eighth in the lease, six sevenths of the leasehold; and, after the property under the contract of February 8, 1911, has been re-equipped and is yielding large returns upon the investment, seeking to set aside both contract and lease and reacquire the whole property, and that too, although he entered into that contract after reaching his majority and thereafter induced large expenditures of money on the strength of it and accepted large benefits on account of it; and the question before us is, whether the court erred in refusing to permit him so to do.

Plaintiff insists that his lease of August 24, 1909, made during his minority, was void as in violation of the act of May 27, 1908. This

point is well taken and it has been so held by us ever since *Jefferson v. Winkler*, 26 Okl. 653. In that case a minor Creek girl married and, after the passage of said act, conveyed a portion of her allotment. Thereafter, pursuant to an order of the county court, her guardian sold her allotment to another. In a contest over the  
943 land between the two grantees the court, in effect, held that, while said act removed all her restrictions, it, at the same time, passed the minor and her allotment under the jurisdiction of the probate courts of the state which alone had power to sell her allotment, and hence her conveyance thereof was, not voidable, but void. In summing up the act, the court said:

"In other words, construing all of the foregoing provisions of said act together, we think it was the legislative intent to provide that the allotted lands of freedmen and mixed blood Indians having less than half Indian blood, under the age of 18, if a female, and under the age of 21, if a male, may be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise.

"It therefore follows that since Rebecca Johnson was not 18 years of age at the time she conveyed the land in controversy to defendant in error, and the sale to him was not made under the supervision and order of any probate court of the state, he acquired no title thereby, and has not sufficient interest in the lands in controversy to entitle him to maintain this action."

Of course what is there said concerning a sale would be true of a lease executed by a minor in violation of the act. It would also be void and not voidable. In *Truskett v. Closser*, supra, the Supreme Court, in reviewing that case, construed it to hold that the lease under consideration was void. This was also our holding in *Tirey et al. v. Darneal*, 37 Okl. 606, and in *Reid v. Taylor*, 43 Okl. 816. This question was also squarely decided in *Barbre et al. v. Hood*, 227 Fed. 658 by Hook, Circuit Judge. The suit involved the title to 20 acres of land in Nowata county, a part of the surplus allotment of a minor Cherokee freedman. Both appellants and appellee claimed under the allottee; the former by a deed dated April 23, 1910, when he was a minor under the age of 21 years, and the latter by a similar deed dated Sept. 3, 1910, when he was of full age. The question presented was whether the first deed made by the allottee during his minority, in contravention of the act in question, was void or merely voidable. In passing, the court said:

"The deed of the allottee executed when he was a minor and not by a guardian acting under the authority of the court having jurisdiction is void."

See also: *McDaniel et al. v. Holland*, 230 Fed. 945.

944 The court was also right when he held, in effect, that plaintiff was bound by the terms of the contract of February 11, 1911, and refused to set it aside and rendered and entered judgment for defendants. This for the reason that said contract is, in effect, not a ratification of the lease of August 24, 1909, but a new lease and an independent transaction for a valuable consideration,

made after he became of age. We say it was, in effect, a lease for the reason that the intent of the parties thereto to thereby execute a lease appears upon its face. And the intent of the parties as gathered from its face must characterize the instrument. Or, in the words of Justice Lurton in *Tennessee Oil Co. v. Brown*, 131 Fed. 696, speaking to this precise point:

"The ruling intention as ascertained from all parts of the agreement should be given effect."

in determining whether or not the instrument under construction is a lease. As to the rules of construction, in *Branch v. Doane*, 17 Conn. 401, it is said:

"There is no doubt that any words which are sufficient to denote the intention of the parties that one shall divest himself of the possession of land, and the other come into it, are enough to constitute, and will in legal construction amount to, a lease, as effectually as if the most apt and pertinent words had been used for that purpose, provided the transaction does not want, in any other respect, the constituents necessary to make a lease; and it is immaterial whether the words are in the form of a licence, covenant or agreement. Bac. Abr. tit. Leases, &c. *K. Evans v. Thomas*, Cro. Jac. 172. *Hall v. Seabright*, 1 Mod. 14. Thus, if one 'licence' another to inhabit, or to come upon his dock and carry on his trade, it amounts to a lease. *Right d. Green v. Proctor*, 4 Burr. 2209. *Anon.* 11 Mod. 42. But such language does not necessarily, and independent of anything more to show that there was a contract between the parties, constitute a lease. A lease is more than a mere licence; it is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other; or, in other words, a conveyance to a person for life, or years, or at will, in consideration of a return of rent or other recompense. 4 Cruise's Dig. 67. *Jackson d. Webber & al. v. Harsen & al.* 7 Cow. R. 326. 3 Blk. Com. 317. If, therefore, the words, whatever they may be, which confer authority to another to take possession of land, are not accompanied with language or stipulations which evince such a contract between the parties, they would amount to a mere licence, \* \* \*."

In *Haywood v. Fulmer et al.*, (Ind.) 32 N. E. 574, quoting approvingly the court said:

"A lease is a contract by which one person divests himself of, and another takes the possession of, lands or chattels for a term, whether long or short.' Wood, Landl. & Ten. §203. \* \* \* 'A lease is a species of contract for the possession and profits of lands and tenements, either for life or a certain term of years or during the pleasure of the parties.' 12 Amer. & Eng. Enc. Law tit. "Lease," 976. \* \* \* 'No precise form of words is necessary to make a lease. Any written instrument expressing the agreement of the parties, signed by one and accepted and acted upon by the other, will be obligatory upon both.' *Alcorn v. Morgan*, 77 Ind. 184. In the case from which we quote the foregoing, the written instrument which the court there held to be a written lease was in form a receipt, but contained independent stipulations sufficient,



in the opinion of the court, to make it also a contract. A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally for the time limited, or for some specific purpose or in some specific manner, or the right to occupy and cultivate and to remove the products of cultivation; but it may confer upon him the power to occupy and remove a portion of that which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove ores, minerals, mineral coal, etc., or to sink wells for procuring and removing petroleum and natural gas."

Tested by these rules, the instrument under construction possesses every element of a present lease. When it says, as it does, that the parties hereto contract and agree that each of them shall have and hold, in the proportions thereafter described, the exclusive right to mine oil and gas from and upon certain lands therein described, it means that each of them may enter and take possession of those lands and hold them in joint possession for that purpose. This, then, is a contract for the possession of lands. And, when it further says that they shall have the exclusive right to mine as long as oil and gas, or either of them, are found upon said premises in paying quantities, it fixes a certain term or, what is the same thing, one capable of being made certain; and thereby supplies another element of a lease. And when the lease further provides that plaintiff shall receive "as royalty for said leased premises one-eighth of all oil mined and saved upon said premises," it supplies the remaining element which is rent or recompense to the lessor or owner of the land. Moreover, as additional compensation to plaintiff, it is further agreed that plaintiff "shall have and hold an undivided one-fourth of the leasehold interest in said property," which by "leasehold interest" is meant one-fourth of the right to mine for oil and gas, or, in other words in addition to his royalty, should receive as recompense one-fourth of the oil produced upon the demised premises. It is unnecessary to say more to bring the instrument within

946 every definition of a lease but, we will add: as the intent in making the instrument is to govern in characterizing it, here is one which shows upon its face the intent to be to make a lease when it speaks of the lands therein described as the "leased premises" of the interest conveyed as a "leasehold interest," and hence we hold the instrument to be a lease and so, in effect, declared to be upon its face.

United States v. Gratiot et al., 15 Pet. 562, was a suit against the sureties on a bond given for the faithful execution of a license given their principal, with the approbation of the President of the United States, to purchase and smelt lead ore at the United States lead mines on the upper Mississippi for a period of one year from the date thereof. The question certified to the court was whether the President had power under a certain act of Congress to make the contract set forth in the declaration. That question turned upon the further question of whether the contract was a lease within the meaning of the act. The court said:



"This contract purports to be a license for smelting lead ore; and it is objected that this is not a lease within the meaning of the act of Congress. But this objection is not well founded. It is a contract for one year, and of course, within the time limited by the law, which gives to the President authority to lease for five years. Is it, then, a lease? The legal understanding of a lease for years is, a contract for the possession and profits of land for a determinate period, with the recompense of rent. The contract in question is strictly within this definition. \* \* \* This contract is for the possession of land. The work is to be performed at the United States lead mines, and must of course be performed within the limits prescribed by law to be attached to such mines. And there is an express permission to use as much fuel as is necessary to carry on the smelting business, and to cultivate as much land as will suffice to furnish teams, &c., with provender; and there is an express reservation of the rent of six pounds of every hundred pounds of lead smelted, with special and particular stipulation for securing the same. It is not necessary that the rent should be in money. If received in kind, it is rent, in contemplation of law."

In *Moore v. Miller*, 8 Pa. St. 272, in one of the headnotes it is said:

"In estimating the language which constitutes a lease, the form of words used is of no consequence; it is not necessary that the term lease should be used. Whatever is equivalent will be equally available, if the words assume the form of a license, covenant, or agreement, and the other requisites of a lease are present."

947 See also: *Asher v. Johnson, &c.*, 118 Ky. 702; *Pelton v. Minah Con. Min. Co.*, 11 Mont. 281; *Horner v. Leeds*, 25 N. J. L. 106; *Watson v. O'Hern*, 6 Watts (Pa.) 362; *Wilcox v. Bostick*, 57 S. C. 151; *Munson v. Wray*, 7 Blackf. 403.

This lease, having been executed upon attaining his majority, under circumstances free from fraud and not for a past, but for a consideration to be paid or "for and in consideration of the mutual covenants and agreements hereinafter contained," which were, among others:

"And it is further covenanted and contracted that the expenses of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest of the said Thomas Gilcrease shall not be liable for any of the expense of the equipment or operation of said lease, and shall be free from any expenses whatever,"

—but that he would bear his share of the expense of equipment in such proportion as his interest appeared in the lease, we see no reason why plaintiff should not stand by it.

In *McKeever v. Carter et al.*, 157 Pac. 56, a minor Creek freedman had conveyed or entered into a contract to convey his land in contravention of the Act of May 27, 1908, which the court held was void. Almost immediately on attaining his majority, without fraud or undue influence, he made a deed to the land which the court held

to be valid. After reviewing the act and the holdings of this court construing same, the court said:

"In the light of these authorities it would seem that, even though the agreement to convey the land entered into by plaintiff with defendant while plaintiff was a minor was void, and that same could not be enforced had plaintiff declined to perform the same, yet there was no legal impediment in the way of plaintiff conveying his lands to any grantee he chose after reaching his majority, and upon any legal consideration which he saw fit to accept. \* \* \* There is not the slightest evidence in the record tending to impeach the deeds of August 9th and August 31st, other than the fact that an agreement had been made by plaintiff while a minor to convey his lands to defendant. There is no evidence of coercion, undue influence, or other grounds of equitable interference that would impeach either of said two last-named conveyances, and, if plaintiff was on the date of their execution an adult, he was capable in law of conveying said lands to whomsoever he chose, for any lawful consideration, and could, if he saw fit, give said lands away; and, when he executed and delivered these deeds, and accepted the consideration, said deeds were valid and binding conveyances, and operated to transfer plaintiff's title to the grantee therein named, provided he had then reached his majority."

948 And plaintiff was of age when, on February 8, 1911, he made the second lease. Not only was this the presumption, but such was established by the undisputed parol evidence. But, aside from this, assuming that we can take judicial notice that June 9, 1899 was the date of his enrollment and that the census card so shows, and that he was 9 years old on that date, such is only conclusive that on said date he was in his ninth year or had passed his ninth birthday and had not yet reached his tenth, and hence does not prove that he was a minor on February 8, 1911, which was 4 months and one day less than 12 years thereafter. This is in keeping with what we held in *Heffner v. Harmon* — Okl. — (not yet officially reported) where on this point we followed *McDaniel v. Holland*, supra, and in the syllabus said:

"Under Act May 27, 1908, c. 199, sec. 3, 35 Stat. 313, providing that the enrollment records of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to the age of an enrolled citizen or freedman, the enrollment record, giving the age of an Indian as 9 years, is conclusive that on that date he had passed his ninth birthday and had not yet reached his tenth, but is not conclusive that he was exactly 9 years of age on that day, and does not establish that he was a minor when he made a conveyance of land one month less than 12 years thereafter."

We are therefore of opinion that the judgment of the court was right and should be affirmed. It is so ordered.

All the justices concur.

949 Thereafter, at the October, 1916, Term of said Supreme Court, on the 23rd day of October, 1916, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

vs.

G. R. McCULLOUGH et al.

And now on this day it is ordered by the court that plaintiff in error be given 15 days from Oct. 23, 1916, to file petition for rehearing, and the mandate stayed pending hearing on petition.

\* \* \* \* \*

950 In the Supreme Court of the State of Oklahoma.

No. 5775.

THOMAS GILCREASE, Plaintiff in Error,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL  
BROWN, Defendants in Error.*Petition for Rehearing by Plaintiff in Error.*

Comes now the plaintiff in error, Thomas Gilcrease, and prays the court to vacate and set aside its decision herein and grant a rehearing of this cause for the following reasons, to-wit:

## I.

The court overlooked the inherent nature of conclusive evidence and of laws, making one fact conclusive evidence of another.

One of the principal controversies in this case is as to the age of Thomas Gilcrease on the 8th day of February, 1911, at the time he entered into a working contract covering the operations of his premises, this being the contract which the court in its opinion finds valid and from which it determines the rights of the parties, having properly found a previous contract dated August 24, 1909, to be absolutely void. The Act of Congress of May 27, 1908, chap. 199, sec. 3, provides that the enrollment records of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the age of an enrolled citizen or freedman. The court in its decision and opinion does not give that record conclusive effect and does not give the words "Conclusive Evidence" the legal effect to which they are entitled.

Conclusive Evidence is defined by Bouvier as follows:

"Evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue."

"Evidence upon the production of which the judge is bound by

law to regard some fact as proved and to exclude evidence to contradict it."

It is defined by 3rd Encyclopedia of Evidence, page 268, as follows:

"Conclusive Evidence is that character of evidence which either forbids or dispenses with an ulterior inquiry as to the matter sought to be established by proof."

In *Missouri, Kansas & Texas Railway Company v. Simonson*, 64 Kans. 802, 68 Pac. 653, 91 Amer. St. Rep. 248, the Supreme Court of Kansas says at page 808 of the Kansas Report:

"A statute which declares what should be done as conclusive evidence of a fact is one which of course precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry."

From these authorities it is apparent that the effect of the Act of Congress is to withdraw the question of age from judicial consideration in determining the questions arising under that act and to make actual age immaterial and to fix for the purpose of the act the age shown by the enrollment records as the age by which minority or majority shall be shown. Most statutes which have undertaken to establish a rule of conclusive evidence have been declared unconstitutional by the courts as an invasion of the judicial function and as depriving persons of property without due process of law, and this decision has always been made upon the ground that such statutes prevent judicial inquiry into the actual evidence upon which the party rights depended, but many courts have upheld such statutes, but only in cases where the legislative department had the right to fix the substantive law and have held in all such cases that the establishing of such a rule of evidence was in effect the making of substantive law. See *Wigmore on Evidence*, vol. 2, sec. 1354, pars. 1-2, and in general upon the subject of Conclusive Evidence. See secs. 1353 and immediately preceding sections. To the same effect, see 3 Ency. of Evidence, pages 291-293 inclusive.

In no case in which the judiciary did not have the power to fix the substantive rights of the parties and enact the substantive law upon the subject, the courts have upheld acts of that character. In *Commission of Fisheries et al. v. Hampton Roads Oyster Packers & Planters Association*, 64 S. E. Rep. 1041, the Supreme Court of Virginia had before it an act making conclusive evidence certain surveys of the waters adjacent to the State of Virginia to determine their character as oyster beds, and that court upheld the act and said that its effect was to preclude any judicial inquiry into the actual fact as to whether any other waters contained oyster beds and as to whether certain oyster beds were in such waters, and that court cites with approval *Gardner v. Bonstell*, 180 U. S. 362, 45 L. Ed. 574, in which latter case the United States Supreme Court follows the rule which it has long recognized in many other decisions, that the declaration of the political department of the government as to the character of public lands, whether mineral, non-mineral, desert, forest or otherwise, is conclusive upon the courts and precluded any investigation into the actual evidence. So in that class of statutes, like our

own, which make the issuance of a tax deed conclusive evidence that the proceedings culminating in such deed were legal, have been uniformly upheld so far as the recitals in the deed referred to non-jurisdictional matters or matters over which the legislature had control and could create the substantive law. See *Joslyn v. Rockwell, et al.*, 28 N. E. Rep. 604, also *Larson v. Dickey*, 39 Neb. 463, 42 Amer. State Rep. 595.

The foundation and basis of all these decisions is whether they uphold the constitutionality of the act in question or deny its constitutionality and that they prohibit judicial inquiry into the fact, and leave as the sole subject of investigation the fact of the issuance of the deed and its recitals. So in *Safe Deposit & Trust Co. of Baltimore v. Marburg*, 72 Atl. 839, the Court of Appeals of Maryland held valid the act which provided that the failure to demand ground rent for twenty consecutive years shall be conclusive that such rent has been extinguished, to be constitutional and valid because the legislature had the right to fix the substantive statute of limitations and accruing of right by adverse possession and made by this act an actual inquiry as to the extinguishment of the rent proper, leaving only the question as to whether or not rent had been demanded within the period of twenty years.

Giving now these decisions and these authorities their force the effect of the Act of Congress is to say that the age of a Creek citizen or freedman is not an issuable fact in any controversy arising under the Act of Congress; that it has been taken out of judicial inquiry and settled by legislative enactment and that the only question for consideration by the court is what age does the roll show the citizen or freedman to be; for by the express terms of the Act, the enrollment records are the conclusive evidence of the age; that is the evidence which excluded every other form of evidence and every presumption and substitutes for it the ipse dixit of the enrollment record, and it is as if Congress had said in cases involving the age of a citizen or freedman and the validity of his conveyances under the restrictions of this Act, "He is conclusively presumed to be of the age which the roll shows him to be."

If the enrollment record shows the actual birthday, then that controls; if the enrollment record does not give the birthday, but gives the age in years, then there is no presumption that he was of age before the roll shows him of age, but he will be presumed to be actually of the age that the roll shows him to be.

As stated by the court in *Commission of Fisheries v. Hampton Roads Oyster Packers Association*, *supra*, the purpose of the enactment was to prevent the needless litigation and perjuries that resulted from the judicial inquiry into the actual facts and to fix a certainty upon which all parties might depend. It is well known that our courts were filled with perjury upon the actual ages of the Indians and freedmen; that it resulted in uncertainty as to titles and endless litigation. Congress could have had no other purpose in this enactment than to terminate such litigation and such perjury and give certainty to titles, and to hold that the words, Conclusive Evidence, as used in the Act of Congress, do not mean exclusive

evidence as the courts have always held it to mean, is to reopen the door to all this perjury, to all this litigation, and to put a foundation of sand under the freedman and Creek titles.

Congress has not enacted that the validity of conveyances should be determined by actual age, but that the validity of conveyance should be determined by certain conclusive rules; that is to say, by the age shown by the enrollment records, and to deny this conclusive and exclusive effect of the enrollment records is to deny the Act of Congress its force and to refuse to construe it in the light of the wrongs which it sought to remedy.

No opinion that has been handed down by any court upon this subject has ever construed what conclusive evidence means in the law, nor considered the effect of making the enrollment records conclusive evidence in the light of all the authorities discussing what conclusive evidence really is; that is, evidence which fixes a fact, eliminates judicial investigation of the primary fact, and makes the rule laid down by the legislature the sole guide to its determinations.

It is not an attempt to make the actual ages different from what they were, but it is an attempt to say what the word "age," as used in the act shall mean and how it shall be determined and how it shall be conclusively determined; and unless every authority that has ever discussed conclusive evidence or acts making one fact conclusive evidence of another, has misconstrued these acts and repeatedly held them unconstitutional because the effect of them was to prohibit any further evidence on judicial inquiry into the primary fact, has been in error, the holding of the court in this case is unsound.

It is the age shown by the rolls that is the sole subject of judicial inquiry and it is the age shown by the rolls that determines the validity or invalidity of a conveyance. The Act of Congress does not attempt to fix the birthday not in consonance with the fact. It doesn't attempt to say that a party may not have been older or younger, or may not have reached majority at an earlier date than shown by the rolls, but it does say that the roll is conclusive, and thereby exclusive evidence upon the subject of the word "age" as used in the act, for all purposes arising under the act and therefore there is no presumption of majority unless the record shows minority; but the conclusive presumption is that he is of the exact age shown by the enrollment.

If, as stated by these authorities, conclusive evidence excludes all other evidence and determines the fact, then the enrollment record excludes all other evidence and determines the fact of age for the purpose of the act and days and months have nothing to do with the investigation unless shown by the record.

We insist therefore that this question should be reheard by this court, that it fully consider the legal effect of making enrollment records conclusive evidence, as no court has ever done in any of its opinions.



## II.

The court is in error in holding that the date shown upon the card is not the date from which the age is to be computed.

There was introduced in evidence in this case the enrollment record consisting of a census card showing Thomas Gilcrease's age nine, and the court says that there is nothing to show when the application for enrollment was made as if the date of the application for the enrollment governed and further says that the date of this card has no probative force or effect. The syllabus of the case says that there was nothing on the face of the card to show that the date thereof, June 9, '99, was the date of application for enrollment, and the card was without probative force to prove that plaintiff was nine years of age on that date.

"Probative" in the law of evidence, means having the effect of proof, tending to prove, or actually proving, 32 Cyc. 405. Let us see then if there is in the dating of this card any probative force as to the date at which Thomas Gilcrease was determined to be nine years of age.

In *McDaniel et al. v. Holland*, 230 Fed. 945, cited by the court in its opinion, the court says that such a card as we have here, a general census card, represents a finding and judgment of the commission on the application as to the facts therein stated. This date, June 9, '99, appears in the lower right hand corner of the card and is a date, and apparently the date of the record, for it bears no other date and would therefore appear to be without contradiction or explanation the date of the determination that Thomas Gilcrease was nine years of age.

It is common knowledge and common practice, so much so that courts take judicial knowledge of it and presume that the dates in the margin of instruments are the dates of their execution. A date in the margin of a receipt, a bill, a note or a deed has been frequently held to be prima facie the date of its execution and here we have an instrument or record dated and without contradiction or explanation, we have the rule refused, and refused, too, in spite of the fact that the court unconsciously, as did the Circuit Court of Appeals in *McDaniels v. Holland*, supra, give it probative force.

In *McDaniel v. Holland* the court gave it absolutely probative force to the extent that it went, of showing the time from which the age should be computed. It did it unconsciously and automatically.

That has probative force which the normal mind of man takes as some evidence and considers as of some weight for the determination of a fact in issue. This court did not find it necessary to say that other words appearing on the face of the certificate or card did not have probative force merely because they did not indicate anything as to the date of the record or anything as to the date of the determination that Thomas Gilcrease was nine years of age, but unintentionally, automatically and unconsciously the court did turn to this date as the probable date of such determination and of such instrument, and to that extent it did have to this court probative force, as

it must be to every normal mind. It is to be noted that it is not a question of weight to be given to this evidence against contradiction or explanation, but it is a question, as the court stated it plainly, of probative force, and unconsciously the mind turns to this date as a date of the record, as it does to the date on a letter, to a date on any written instrument as a receipt, check or note. Notwithstanding the denial of the court of the probative force of this date it did have probative force to the mind of the court or it would not have considered it, and in all absence of contravening evidence or contradiction caused the mind to turn to it as the date of an enrollment and of the record it is sufficient to establish that fact.

But further, the courts take judicial knowledge of the ordinary practices of the departments of government and that Congress in passing the law in question had knowledge of such practices, and when it adopted a record as evidence of a fact, it knew what that record contained and that the courts would know the practice and recognize such records as the courts recognize the signature of the officers that certify them, and it is common knowledge and the court would take judicial knowledge, and that it is common knowledge that the date of these records is placed upon them in the manner in which this date is placed upon this card.

To be sure in the case of *McDaniel v. Holland*, supra, there was a specific proof that certain words, "Date of application for enrollment," had been inserted after the making of the record, and in addition to the apparent date on the card, which latter the court took as the determinative date and said that the card did show that on that date he had passed his ninth birthday and had not yet reached his tenth.

The effect of the Act of Congress upon this card is to say not that Thoams Gilcrease shall not — presumed to be of age and of capacity unless the enrollment record shall show him to be a minor, nor that the enrollment record is evidence of his age so far as it shows same and that his actual age beyond that may be shown by parole testimony, nor that June 9, '99, shall be deemed as his birthday, nor that he shall be presumed to be incompetent to convey unless he is shown to be 21 years of age by the roll, but clearly and explicitly just what it says: That on June 9, '99, he shall be deemed to have been nine years of age and that he will be deemed to have been nine years of age for one year thereafter, because the roll will not for one year thereafter show any other age for him, nor be evidence of any other age for him, and that therefore he will be a minor for twelve years after June 9, '99, because that which is made conclusive and exclusive evidence of his age does not show any other date for him for twelve years thereafter.

It is as logical to say that the statute in providing that the rolls shall be conclusive evidence of the degree of blood means that the rolls are evidence that the citizen had at least the degree of blood therein named and might have as much more as could be proven by parole testimony as it is to say that the enrollment records shall be conclusive evidence of the age and that shall mean that the

citizen shall be deemed of the age therein mentioned and as much more as may be proven by parole testimony.

It will be noted that this is not a case in which there is a written application for enrollment and upon which there is evidence of age, but that the enrollment record shows only what appears upon this card. The date of the application, therefore, for enrollment is immaterial. The record as it stands shows only the age upon a given date, June 9, '99, and the date of the application if shown could throw no light upon the matter. There is nothing in the act that makes the date of the application the date from which the age shall be computed, but the record as it stands is taken as the arbitrary standard to determine this question for the courts to end litigation upon this subject and to put a stop to the needless perjuries that were committed in similar cases. For the purposes of this act, all questions arising under which actual age is absolutely immaterial and evidence of actual age cannot in any way satisfy the statute should be competent as proof upon the question of the competency of a Creek citizen to convey. Congress must have known that it is only in rare instances that the records show the birthday and that in a great majority of the cases the records do not correspond with actual age and the Commission could determine age by mere inspection, by parole testimony and other means, but Congress adopted the enrollment record as the conclusive evidence upon the question of competency to convey, and it did it knowing that the enrollment records did not show actual age except in rare instances, and that the age shown was in a great majority of the cases not the true age; but Congress did not attempt to legislate that the citizen was of the age, which in fact he was not, but that for the purpose of determining his right to convey he should be deemed of the age shown by the enrollment record.

In other words, the object of Congress in passing this law was to fix a definite date in each individual case when the restrictions were removed from the lands of minors and when they had the right to sell their lands free from restrictions instead of by fixing their exact age by such act.

The contract of February 8, 1911, is voidable for fraud, both actual and constructive.

This Court has held in this case in consonance with the statute and all decisions upon similar questions that the lease executed by Gilcrease on August 24, 1909, was absolutely void. It will be remembered that this lease was executed to G. R. McCullough; that subsequent to its execution and prior to the 8th day of February, 1911, the date upon which Gilcrease became actually 21 years of age, he had repurchased from McCullough a one-fourth interest in that lease and had allowed McCullough as consideration therefor all but \$2,000 of what McCullough had agreed to pay for the entire lease, and this, too, not as stated in the opinion, after there had been a rise in value and in the price of oil, nor after there had been any change in the possession or threats of Millikin, the then existing lessee, but while the condition remained substantially as when McCullough had bought.

It is not our purpose to discuss the voidable character of the original lease of August 24, '09, because it was not only voidable for fraud, but void in fact, so that when Gilcrease became, under the Congressional Act, entitled to convey he was the absolute owner of his lands free of any lease.

Therefore, if Gilcrease was entitled to convey or lease on the day he became 21 years of age, in fact, he was by reason of the void character of the former instrument the absolute owner of his premises free and clear of any lease or encumbrance, and the lease to McCullough of August 24th, being absolutely void, as held by this court and by all courts, created not even a cloud upon his title. In other words, it was an absolute nullity.

Now, let us see what happened and determine whether the working contract of February 8, 1911, relied upon by defendants in error as the foundation of their title and held by the court in its decision to constitute a sound lease and to be a valid lease, giving defendants in error all the right that they have in the premises, is voidable for fraud, both actual and constructive.

Preliminary to this, we may suggest that it was the theory in the court below and extensively argued and briefed in this court and insisted in the briefs that this contract of February 8, 1911, was a ratification of the former lease, and that the former lease might be so ratified. It was the evidence of Martin in the court below that the purpose of making the contract of February 8, 1911, was to definitely determine their rights under the lease and so was the testimony of Gilcrease. It was not its intention to create rights, and contrary to the statement in the opinion, it was not founded on any new additional consideration; nothing was paid for it, but this court has not only permitted the shifting of the position of defendants in the court below from the theory that this contract was a ratification of the lease to the theory that it constituted itself a lease, but has actually made the shift of theory itself and gone outside of the theory upon which the case was tried and upon which briefs were originally submitted in this court.

But for the purpose of this argument, though not conceding it, assume that the contract of February 8, 1911, was what this court has assumed it, "A sufficient lease," let us see if it is voidable for fraud.

Be it remembered that Martin was employed as Gilcrease's special counsel by the year to attend to all his legal business and *he* his general adviser; that Bradshaw was his guardian, and in this connection allow us to suggest to the mind of the court in its opinion that Bradshaw was only a Special Guardian, that there is no such thing known to the laws of this State as a guardian for the purpose of procuring specific money from a specific debtor of the ward. McCullough was Gilcrease's banker, Bradshaw was cashier of McCullough's bank and Martin was attorney for the bank. Martin by his own testimony was advising Gilcrease that he had a right to deal with these lands after he had his disabilities of minority removed by the State court, and Gilcrease testifies to the same facts, and this in spite of the fact that the case of *Jefferson v. Winkler* holding to

the contrary had already been decided by this court. McCullough was claiming under this lease made pursuant to the removal of disability on August 24, 1909, to McCullough. They were claiming it a valid lease. Gilcrease was inquiring of Martin as to its validity and was told that it was binding and that he could do nothing, and that if he wanted an interest in the lease back he must buy it, and pursuant to that advice Gilcrease did buy back the one-fourth interest, paying therefor within \$2,000 of what McCullough had agreed to pay him, but had not paid him, for the entire lease. The lease at that time was estimated by all of them to be of the value of not less than \$100,000 and McCullough sold back this one-fourth interest prior to February 8, 1911, the date of the working contract, for \$15,000. It is evident, therefore, that these parties claiming under the McCullough lease and claiming it to be a valid lease by their own testimony, as well as Gilcrease's, and by their own acts, conclusive evidence of their claims, and yet that lease was void under all the decisions. To claim property as against a party upon a claim void in law is in equity a fraud.

This court overlooked in its decision of this case such cases as *Wagg v. Herbert et al.*, 19 Okla. 525, 92 Pac. 250, which went to the Supreme Court of the United States and was there affirmed in 215 U. S. 546, 54 L. Ed. 321, where the Supreme Court of Oklahoma Territory held, and it has been followed in a branch of the same case by this court, that "To insist on what was really a mortgage is a sale, is in equity a fraud which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be," and that case quotes from the leading case in the United States upon the subject, *Russell v. Southard*, 12 Howard 139, 13 L. Ed. 927, where the Supreme Court of the United States says:

"To insist on what was really a mortgage is a sale is in equity a fraud."

The principle of these cases is identical with the case at bar. Is it more of a fraud to insist on a mortgage in the form of a deed, as was done in *Wagg v. Herbert* and *Russell v. Southard*, than to insist that a nullity is a valid lease and that a valid lease exists, and thereby obtain a contract founded upon such lease and recognizing as valid the interests therein created, or obtaining what the parties intended as such recognition, but was artfully drawn, without words of grant or conveyance, as to induce this court to hold that it is in fact a lease? In *Wagg v. Herbert* the court held that as *Wagg* had procured an absolute deed in regular form by insisting that a former deed which was given as security for a debt in fact conveyed the property, he committed a fraud, and the new deed was avoided for that reason. So good conscience dictates that in this case, when these parties insisted that the pretended lease of August 24, 1909, was a valid lease and thereby secured the working contract, termed a lease in the opinion of the court and dated February 8, 1911, they committed such fraud as would void the contract, whether considered as a working contract, governing proceeding under the lease, or considered as a lease; but in this connection let us call the attention of



the court to the difference in its construction of this contract and a similar one found in *Cox v. Delmos*, 32 Pac. 836, where the Supreme Court of California held that a contract between a client and his attorney which recited that the attorney was the owner of a certain judgment obtained on behalf of the client and was entitled to collect it, would be construed as merely an admission of a condition caused by prior acts and not as a grant in itself. We ask the Court to read this decision in which it is held that such instrument is void at the election of the client.

We insist, therefore, that regardless of the relation of the parties, but treating all as strangers dealing and entitled to deal at arms' length with each other, the contract relied upon to sustain the interest in these premises on behalf of defendants in error and dated February 8, 1911, is voidable for fraud on account of the parties making a baseless claim as a basis upon which it is secured, and this whether the securing of the contract was due to a mutual mistake of law, or the parties sought the advantage of Gilcrease.

But let us consider further. The value of this property was estimated by the defendants themselves at that time as \$100,000. It was an equipped lease with from \$40,000 to \$60,000 of improvements that must be left thereon. It was drilled and producing hundreds of barrels of oil per day. The evidence as to its value at the time of the taking of the original lease of August 24, 1909, shows it to be estimated at from \$60,000 to \$400,000. Many wells were upon it, and the day this boy becomes actually 21 years of age he is induced to make a contract by which it is claimed that G. R. McCullough acquired a one-half and H. B. Martin a one-fourth interest, not only in the oil and gas and the profits of the enterprise, but in the actual equipment on the lease, and even the original lease of August 24, 1909, did not purport to make anyone but Gilcrease the owner of the equipment, and did not grant the equipment to anyone nor any interest in the equipment. Martin was holding Gilcrease in line by telling him he was bound by his prior contract. Gilcrease was in fact the absolute owner of this land, free of any lease, and he was under obligation to return to McCullough if he cancelled the lease, his previous existing contract, though not under such legal obligation to return \$2,000 of McCullough's money which he had received on the lease of August 24, 1909.

Here, then, is a person 21 years of age on this date, owning a property which was at the time claimed to be worth \$100,000 and in which they had conveyed him some time previously a one-fourth interest for \$15,000, but without any new consideration and under the advice of his counsel taking the benefit and who is attorney for the other party taking the benefit, he conveys all this wealth, if this contract is to be construed as a conveyance, to his attorney and his banker for the sole consideration of the \$2,000 which he has of McCullough's money.

It is conceded that Martin's advise that he had a right to deal with this property prior to this time was not proper advice, and it has been decided in this case not to have been proper advice, and decided by this court in many instances and by the United States



Supreme Court not to have been proper advice. What is the rule governing such transactions? We find it stated in *Cox v. Delmos*, 33 Pac. 836, as follows:

"But the utmost view that can be taken of the subject favorable to appellant's contention is this, that the attorney must show affirmatively that he gave full and proper advice in the premises and acted with entire fairness throughout the entire transaction, and took no advantage of his client."

So in *Elmore v. Johnson*, 143 Ill. 513, 36 Amer. St. 401, the court says:

"In case of the purchase of all or a part of the subject matter in litigation during the pendency of the suit by the attorney from his client, the transaction is presumably fraudulent and the burden is on the attorney to show affirmatively most perfect good faith, the absence of undue influence, or a fair price, knowledge, intention and form of action by the client, and also that he gave him full information and disinterested advice."

Can it be said \$2,000 was a fair price for this property? Can it be said under the evidence shown in this case that Gilcrease knew the value? Can it be said that the advice given by Martin was proper advice, and yet Martin obtains this one-fourth interest under this advice, and where the whole interest passing to McCullough is secured for the \$2,000 which Gilcrease has of McCullough's money? It will be noticed that there was litigation over this property at the time; not over the title, to be sure, but with Millikin, over what he should do with reference to the removal of equipment from the premises and in what condition he should leave the wells, and Martin was representing Gilcrease in that litigation, and Millikin was threatening, or at least had so threatened, if the litigation had been brought by Gilcrease, that he would wreck the existing wells upon the premises.

What is the law with reference to the dealings between attorney and client under such circumstances? In *Elmore v. Johnson*, supra, the court says:

"If the title to the property is so involved in litigation that the value of the property depends upon a decision as to such title, a contract between attorney and client made during the pendency of the litigation to compensate the attorney for his legal services with part of the property involved is voidable at the election of the client, irrespective of the fairness or unfairness of the contract, provided such election is exercised within a reasonable time."

In *Rogers v. R. E. Lee Mining Co.*, 9 Fed. Rep. 721, the court says:

"A contract of purchase and sale between an attorney and client is voidable at the election of the latter where the attorney while negotiating for the purchase of the property is acting for the client in a litigation of which it is the subject matter and is called upon to advise the client as an attorney as to how far such litigation is likely to affect his title to the property, or the value of his interest in it."

In the last mentioned case in what seems would be answer to the

contention in this case that Martin was not advising Gilcrease as to business, but only as to law, the court says:

"It is true that Marshall had up to the time when negotiations for purchase by him commenced, been the attorney of complainant only for the purpose of defending her title and having no occasion to inquire into the question as to the value of the mines; but the moment these negotiations were opened the relations were changed and it became his duty to use due diligence to ascertain the value of the property as near as possible and advise complainant as her agent. It was at least his duty to suggest an investigation by the usual methods. If he had without knowledge as to the value of the property and without suggesting an investigation, advised a sale to the other party at a price which proved to be inadequate, it is clear that he would have failed in his duty, and it is equally clear that he could not purchase under like circumstances, his own ignorance as to the value of the property so far as being a circumstance in his favor is a strong reason for holding that he was bound to inform himself so as to be able to advise his client."

What the result of Martin's effort to prevent a devastation of the property would be, Gilcrease did not know. Martin knew, or should have known, that the law in Oklahoma is strong enough to protect, as it did in this case, the property from being wrecked or destroyed by Millikin, and yet instead of satisfying his client upon this proposition, it was urged as a reason why the property was not of full value.

The court in its opinion says that Gilcrease upon becoming 21 years of age, on the 8th day of February, 1911, had the right to give away his property or convey it for any price at which he saw fit. Any way, "No gratuity or gift to a legal adviser in payment of his fair professional demand made during the time that he happens to conduct or manage the affairs of the donor, will as a rule be permitted to stand; more especially if such gift or gratuity arises immediately out of the subject then under his advise, conduct or management." Evans Agency 291. See also general note upon the subject by Marshall D. Ewell, in 9 Fed. Rep. 728, where the rule is laid down:

"And generally in matters of contract between legal advisers and their clients, the legal advisers may contract with their clients only when the relation was dissolved or the attitude relating to their positions was specified."

In *Valentine v. Stewart*, 15 Calif. 387, the court says:

"The attorney when acting for his client is bound to most scrupulous good faith. Even when the attorney purchases the subject of the suit, the client may set aside the purchase at will, unless the attorney show by clear and conclusive proof that no advantage was taken; that everything was explained to the client, and that the price was fair and reasonable."

In *State v. Johnson*, 128 N. W. 837, the Supreme Court of Iowa says:

"A contract between attorney and client will be closely scrutinized and unless shown to be fair and just will not be enforced."

So in *Palms, Administrator, v. Howard*, 112 S. W. 1110, the court says:

"Courts will examine closely transactions between attorneys and clients to protect the clients' rights and to prevent fraud by the attorney and any disadvantage to the client from the transaction will entitle him to relief, proof of actual fraud being unnecessary."

Many other authorities are cited in our original briefs. Here was an attorney acquiring a one-fourth interest in this property under bad advice to his client at a price so grossly inadequate as to shock the common conscience of mankind, and this on the day his client became 21 years of age and with an adverse claim to the property that he had a valid lease outstanding, when in truth and in fact the outstanding lease was utterly void and gave no rights. But under the evidence in this case, though his name does not appear in the contract of February 8, 1911, Bradshaw, the guardian of Gilcrease, was likewise obtaining a one-fourth interest, not only in the leasehold, but in the equipment upon the lease and the relation there existing between Gilcrease and Bradshaw of guardian and ward, created a condition by which Bradshaw could not be a beneficiary of this transaction. The rules governing dealings between guardian and ward are similar to those governing the relationship of attorney and client. See

*Winter v. Truax*, 87 Mich. 324, 24 Amer. St. 160.

*Hannah v. Spotts*, 5 B. Monroe, 362, 43 Amer. Dec. 132.

*Wilson v. Wilson*, 133 N. W. 447.

*Haines v. Montgomery*, 132 S. W. 650.

The rule is thus stated in *Ludington v. Patent*, 86 N. W. 571:

"No rule is better established than if the trustee or persons standing in a relation of trust and confidence with another deals with cestui que trust of such, either in respect to the subject of the trust for his own benefit, or that of others whom he represents, cannot be upheld if called in question by the cestui que trust, unless the trustee is able to prove to the satisfaction of the court by clear and satisfactory evidence that the two were at arms' length in the transaction; that no confidence was reposed in him by the beneficiary; that the bargain was profitable to the beneficiary, and that he was fully informed of the value of the property and the nature of his interest in it."

And on page 581 the rule is further stated:

"The trustee must show by unimpeachable evidence that the beneficiary being sui juris had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing and gave a perfectly free consent, and that the price paid was fair and adequate."

In *Mohler v. Sands*, 133 Pac. 238, we have a similar case where a client was induced to sell to a business associate of his attorney the claim concerning which the attorney was acting, for less than its value, and although the attorney had advised the client that she would probably get her claim in full by waiting, the transaction was

held fraudulent though the fraud was much less vicious than in the case at bar.

It is not true that a person 21 years of age may give his property to his guardian and his attorney for a grossly inadequate consideration and not have the transaction subject to impeachment, either on account of the inadequacy of the consideration or on account of his ignorance of his rights or on account of the fact that the property was the subject matter of litigation in which the attorney represented him, and this even though the attorney gives proper advice, but in cases like the one at bar where he is given advice in face of decisions of the Supreme Court of his State, greater reason exists for setting aside the transaction. And then to add to all this, there is claim made under a void lease to the property and an unlearned Indian is induced to sign a contract recognizing it as valid and conveying rights on his property to others for a grossly inadequate consideration, it shocks the common conscience of mankind. But this is not all; the evidence in this case shows that Bradshaw paid nothing for his one-fourth interest. Why, then, did he get it? The evidence in this case is closely conclusive that Martin paid nothing for his one-fourth interest. Why then did he get it? It is true that there is claim in this case that Martin gave his check for \$9,000 after the money in the bank to meet it and his note for \$6,000 in addition, making a total of \$15,000, for his one-fourth interest. Martin's evidence is that he did not have the money in the bank and that he put it in there by dribs, subsequently, to meet his \$9,000 check. That this is wholly false is shown by his loss and inability to produce his bank books and by the fact that the records of the bank itself show no subsequent deposit to meet this \$9,000 check, and show that on the date it was given and presented to the bank, if presented, he was indebted to the bank, had no funds there and that on that date at the close of his account there was a credit of a bulk sum of \$9,000 and a debit of \$9,000 offsetting it, leaving his balance against him at the close of the day the same as it had been at the opening of the day. That McCullough's account showed no increase of the \$9,000 deposit; that on no other record of the bank could be found anything, or any trace of this \$9,000 check; that Martin could not explain where he got it to deposit, although his account showed no other item of any considerable amount.

We have, therefore, a case in which a minor whose guardian and whose attorney each obtain a one-fourth interest in his property, worth hundreds of thousands of dollars, on the day that he is 21 years of age, without any consideration, while his banker, who is also represented by his attorney and is a business associate of his guardian, obtains the remainder for the total consideration of \$2,000, when the equipment on the lease is worth from \$40,000 to \$60,000, and the lease itself is worth hundreds of thousands of dollars, and the banker has just sold to said minor a one-fourth interest in the lease for \$15,000, the lease not carry ing any title to the equipment on the property.

That this contract was unconscionable, see the authorities cited in our Supplemental Brief, none of which have been considered by the

court in its opinion. Beginning on page 11 of our Supplemental Brief and extending to page 18 inclusive are citations of authorities which culminate in a decision of *Jones v. McGruder*, 12 S. E. Rep. 1282, where the court says:

"A transaction may of itself and by itself furnish a most satisfactory proof of fraud so conclusive as to outweigh the evidence of witnesses. Circumstances attending and following the transaction are often of such a character as to leave not even a shadow of doubt of the motive of the parties engaged in it. Motives and intentions of the parties can only be judged by their actions and the nature and the character of the transaction in which they are engaged. These often furnish more conclusive evidence than the most direct testimony."

These authorities cited all go to the point that inequality and gross inadequacy of consideration may of itself furnish conclusive evidence of fraud.

On page 18 of said brief and extending to page 24 thereof, is citation of authorities upon the question of "Catching Bargains," of which this case is a conspicuous example. A catching bargain is defined to be a purchase by an unconscionable agreement of an expected estate from an expectant heir, reversioner or remainderman. These contracts have been abhorred in the law from the earliest days, and yet in the case at bar we have the heir expectant on coming into possession of his property, but not yet in possession of it, and not in position to give possession of it for sixty days, and it the subject of a lease, and he, the remainderman, and the lessee in possession threatening ruin of the property, disposes of his vast estates to his attorney and his guardian, who neither pay a dollar therefor, and to his banker devises these hundreds of thousands of dollars in value in consideration of \$2,000. This is a clear case of a catching bargain by a remainderman taken advantage of by those in position of confidence and trust.

We ask the Court to read the authorities cited in our Supplemental Brief and give them the weight to which we believe they are entitled.

The fact that this petition has gone to such great length prevents us from further citation of authorities and further discussion, but we have attached hereto in the form of an Appendix the material excerpts from the evidence upon the points involved herein, so that the court may conveniently consider the record. As stated in the opinion of the Court, there is little dispute as to the substantial facts. The only dispute as to a substantial fact is as to whether Martin actually paid anything for his interest. Bradshaw would not even testify as to his payment, and yet he was obtaining a secret interest under the contract relied on for rights in this case. We ask the court the reading of the record.

To hold that this transaction is not reeking with fraud is to repeal our statutes on that subject and abrogate the Decalogue and disregard every authority that has considered such transactions.

And it does not do to say in the face of the relation of the parties and in the face of the fact that Gilcrease was not trying to be a phil-

anthropist and give away his property, but was seeking to conduct a business transaction; that he had a right to dispose of his property at any price he saw fit.

True, he had a right to give away his property. True, he had a right to sell it at any price he saw fit; but when he did it under the circumstances shown in this record, he had the right to avoid it.

Respectfully submitted,

BIDDISON & CAMPBELL,  
*Attorneys for Plaintiff in Error.*

#### APPENDIX.

We herewith append the portions of the testimony which we think that it is necessarily essential for the Court to read to get a proper understanding of the propositions of both actual and constructive fraud perpetrated by defendants in error in this cause on the *defendant* in error, and although it is somewhat extensive, we earnestly request the Court to read it.

#### *Testimony as to Value.*

Mr. Gilcrease, on page 343 of record, testified:

"Q. You know how many wells are being operated down there now?

A. Forty, I think."

And on page 338:

"Q. What did he (Martin) say to you about what the lease was actually in his judgment worth?

A. Well, after he came back, he had not said before then; after he came back over there, though, he told me he thought the lease was worth \$100,000 in his judgment, he said.

This was at the time that Gilcrease and Martin purchased a half interest in the lease in October, 1910."

And on page 664 Mr. Martin testified:

"Q. Didn't you testify in the receivership hearing that in October, 1910, when these assignments were made by McCullough to you and to Gilcrease respectively for a purported consideration of \$15,000 from you and \$15,000 from Tom Gilcrease, that a half interest was in your opinion then worth \$50,000?

A. Yes, that is what I thought.

Q. You thought it was?

A. Yes, sir.

Q. And you gave them a one-fourth interest then for \$10,000 less than what you thought it was really worth at the time?

A. Well, of course, the question of value was a mere matter of opinion, but I thought at that time—my expectations of the lease were sanguine—I thought it was going to be a good lease and I think I said at that time I believed it was worth \$100,000. Of course, I didn't know whether it was or not, but I did believe it."

On pages 338-9 Gilcrease testifies in reference to the deal in October, 1910:



"Q. Was he talking about that lease you had given them?

A. Yes, sir. He was talking about the lease I had given them. After he said they would not take that, Mr. Martin said, I asked him if he would go see them again and see what I could get for it, for he says: 'You go talk to them and see what they say.' He had already seen them. I did go and ask Mr. Bradshaw and Mr. Bradshaw says, 'Well, I don't believe I want to sell my interest in it.' He said, 'You see Mr. McCullough over there.' I seen Mr. McCullough and he told me he says I will take \$50,000 for a half interest in it. I told him I says I thought that was too much money. He says, 'We don't care to sell it for that.'"

On page 812 Mr. McCullough testifies:

"Q. When did he (Gilcrease) talk to you about wanting to buy a part of the lease back?

A. Well when you say?

Q. Yes, the date as near as you can—the first occasion.

A. I think possibly along about August, 1910.

Q. In that transaction was he wanting to buy the whole lease or an interest in it back?

A. Well, he first wanted to buy the whole lease and then he wanted me to sell him an interest. He was to see me a lot of times, I expect, in two months.

Q. What was the result of his seeing you with reference to buying the lease or an interest in it?

A. The final result?

Q. No; up to the time Martin came in, what had been the result?

A. Well, I had told him every time that I didn't want to sell it, and along a little while before Mr. Martin came to me I told him if he wanted it bad enough I would sell him a half interest in it, and he wanted to know the price and I made him a price.

Q. What was the price you made him?

A. Fifty thousand dollars."

There were forty or more producing wells on the lease at the time of the transaction in question here, producing more than 300 barrels of oil per day.

On pages 384-5 Mr. Gilcrease testifies:

"Q. I will ask you, Mr. Gilcrease, if at any time you sent a representative down to sell the lease while Mr. Millikin was still operating it to learn how much oil this lease was producing. Did you do that—a Mr. Coe, to refresh your recollection?

A. Mr. Coe, he did that.

Q. I will ask you, Mr. Gilcrease, if it is not a fact Mr. Coe's reports made to you as to the production of this lease showed that it was producing about 300 barrels a day, the entire forty-two wells?

A. I don't remember just—this fellow, I know, he generally sent his reports up to you (H. B. Martin)."

Mr. L. F. Broach, Chief Clerk of the Gulf Pipe Line Company, testified as to the amount of oil produced from this lease during the years of 1911, 1912 and 1913, and the statement introduced as part of this testimony at page 484, shows that during the months of March and April immediately after the expiration of Millikin's

lease and commencing of operations by parties to this proceeding, this lease produced 28,646 barrels of oil, approximately 470 barrels a day.

At page- 503-4 H. Y. Arnold testified that at that time, in August, 1909, producing properties were selling at from \$200 to \$400 a barrel daily production.

"Q. Do you know about what the value of oil producing properties in that country was at that time, in August, 1909?"

A. Producing properties at that time were selling at from two to three or four hundred dollars a barrel.

Q. Daily production?

A. Yes.

Q. From \$200 a barrel to \$400 a barrel.

A. Up to \$400 or \$500 a barrel, depending entirely on the age of the property."

Mr. E. R. Kemp, an experienced oil man, testified as follows (pages 536-537):

"Q. Are you acquainted with the Gilcrease lease?"

A. Yes, sir.

Q. How long have you known the property?"

A. I have known it ever since I have been operating down there. I have never been on the lease itself, but I have driven alongside of it very often.

Q. Taking that lease as in August, 1909, what was a fair market value of that lease, to be left in the condition that the government leases required them to be left, about what would be the value of that lease?"

A. Well, I would like to know how many wells were on the property.

Q. There were forty-two producing wells at that time.

A. And would also like to know what the production was.

Q. About twenty-five thousand barrels a month.

Mr. Martin: I don't believe there is proof of that.

Mr. Gilbert: Let it go on that basis.

A. What was the date, August, 1909?"

Q. August, 1909.

A. The property was worth about two hundred thousand dollars."

John F. Hayden testified (page 541) that he would have paid for the lease at that time sixty thousand dollars.

D. F. Connelly, witness for the defendants, testified (page 582):

"Q. In your opinion what was the fair market value of the lease upon that property at the expiration of the Millikin lease (February 8, 1911)?"

A. It was quite valuable, I think, at that time.

Q. How valuable?"

A. Possibly worth one hundred thousand dollars."

It cost approximately three thousand dollars to drill and case a well. P. M. Keer testifies (page 499):

"Q. About what did it cost in that vicinity to put down a well at that time and case it (August, 1909)?"

A. Well, I would imagine somewhere in the neighborhood of five thousand dollars.

Q. That is, including tubing, or just the well and casing?

A. Tubing and all complete.

Q. About what would it cost to put down a well and case it; just the naked casing?

A. The casing would cost about 60 cents a foot, and I think we paid 75 cents a foot for making the hole; your derrick would cost about \$700. That would be about \$900 for the casing, \$1200 for making the hole—somewhere in that neighborhood; \$700 for the derrick.

Q. In round numbers it would cost about \$3000 to put a well down there and case it without putting any tubing in or anything of that kind?

A. It would cost more than that, the first well. You would have extra casing to buy—extra casing for the first well."

E. E. Stafford testified (page 529):

"Q. Do you know about what it would cost to drill a 1600-foot well and case it in the Glen pool in 1909?

A. Yes, sir.

Q. About what would it cost?

A. I should say \$3,000; maybe just a little more than that, according to the amount of casing they used on them, the amount that they put in the well. Some operators operate differently."

#### *Relation of Parties.*

The defendant Martin was acting as Gilcrease's attorney in all his matters under a general retainer (see contract of employment, page 314 of the record), and had been acting as Gilcrease's attorney from the time Gilcrease first came to Tulsa in the latter part of 1908, or the early part of 1909, until a short time before the filing of this suit. Mr. Gilcrease testified, page 326:

"Q. About when, as near as you can arrive at, was the first interview, arrangement or contract with the firm of Hainer & Martin?

A. I think it was some time in January, 1909.

Q. About how long after that was it before you actually began to have dealings with Mr. H. B. Martin?

A. I think I went up the next day, the next day after I went in to see Judge Hainer.

Q. Saw Mr. Martin there, you think, the next day?

A. Yes, sir, he was there.

Q. Did you have a written contract with Hainer & Martin at that time?

A. I don't know whether it was at that time or not, I had a written contract with Mr. Martin and Mr. Hainer.

Q. Did you turn over to them your documents, deeds and papers?

A. Yes, sir.

Q. From that time did you have business dealings with Hainer & Martin, or with Mr. Martin?

A. With both of them.

Q. Did you have any place where you transacted the principal part of your business, such as you had?

A. None, except Mr. Martin's office.

Q. Did you make that your headquarters?

A. Yes, sir.

Q. Did you have a desk in that office?

A. Not at that time, no, sir.

Q. Did you ever have a desk in there?

A. Yes, sir.

Q. When did you have that?

A. I believe it was in the latter part of 1910.

Q. Were you in their office frequently from the beginning of 1909?

A. Yes, sir.

Q. Did they have any suits for you?

A. Yes, sir.

Q. Did they have any suit for you against the man who is on your lease, Mr. W. H. Milliken?

A. Yes, sir.

Q. Who attended to the matter of that suit against W. H. Milliken?

A. Mr. Martin.

Q. The defendant in this case?

A. Yes, sir.

Q. Do you recall, Tom, when that suit was filed?

A. I think it was some time probably in July of 1909.

Q. Was it before you made your lease contract to Mr. McCullough?

A. Yes, sir.

Q. Your lease contract that was made to McCullough bears date of August 24, 1909. About how long before that was it that you began to have dealings with any of the defendants in regard to that matter?

A. In regard to this suit?

Q. In regard to that lease or contract.

A. I think it was a few days."

Page 353:

"Q. Up to the time of this conversation in Mr. Martin's library and he mentioned this matter of having the lease put in the hands of a receiver, what had been the relations between you and Mr. Martin?

A. Mr. Martin had always been my best friend. If I had anything to say I always said it to him.

Q. When you made any deals or contracts or anything of that kind, did you consult Mr. Martin about it?

A. I always asked Mr. Martin about it and he always drew up the papers. I never signed anything but what he drew up the papers. He attended to everything I had to do.

Q. Had that been so from the time you went into Hainer & Martin's office in the last of January or first of February, 1909, on down to that time?

A. Well, now, for a while after I first went there Mr. Martin and Mr. Hainer both done the business, but some time later Mr. Martin he done it all himself; attended to it all."

Mr. Martin testifies at page 660:

"Q. When Mr. Gilcrease came to your office and employed the firm of Hainer & Martin he turned over to you what papers and instruments he had, did he not?

A. Well, when I came back. I was absent when Mr. Gilcrease first came to the office, and when I came back there were some abstracts as I remember there, that Mr. Gilcrease had left for examination. I don't remember any notes or mortgages being there at that time.

Q. Your firm was employed generally to look after his business at that time?

A. Yes, sir."

Gilcrease consulted Martin about making the lease to McCullough in the first instance (page 335). Mr. Gilcrease testifies:

"Q. You stated just now, I believe, you had understood that you were going to get \$17,000 at once?

A. Yes, sir.

Q. Why did you say you agreed to take it in a different shape than that?

A. They said they didn't have the money for it; they would pay me \$2,000 at that time and \$500 every ninety days, and Mr. Martin told me, said that was as good a contract as I could get, and the best one, and he said he had put the lease up to several people and he could not get any better offer than that.

Q. That is what he told you?

A. Yes, sir."

After Gilcrease got to thinking about the matter he wanted his lease back and consulted Mr. Martin about it (page 337):

"Q. After your mother had executed that lease to Mr. McCullough, did you afterwards have any further conversation with Mr. Martin about the matter and about the question of whether you could get any part of it back?

A. Not in 1909, I don't believe.

Q. Did you at some other time after 1909?

A. Some time—1910, I believe it was—I asked Mr. Martin then if I could not get this lease back, and I told him I would like to get it back if I could and I would give Mr. Bradshaw and McCullough this money back and pay them the interest on it and give them \$5,000. I believe that is what it was.

The Court: Give them what?

A. Give them their money back they had paid me at that time. At that time they had paid me some three or four thousand dollars. I told him I would give them their money back and interest on it and \$5,000 profit on it if they would assign this lease back to me. That was in 1910 some time. I don't remember just when it was.

Q. What did Mr. Martin say about it to you?

A. Mr. Martin, he told me there was not any way to get it

back. He said that I was a married man and that I had given them this lease and that when I was 21 I would have to execute another lease, I believe is what he said.

Q. Was anything said about what would be the situation if you brought a suit against them to compel them to make it back to you?

A. Mr. Martin told me, said: 'You can't afford to sue them,' he says. 'You can't get it back,' he says. 'You are a married man. You gave them a lease here,' and says, 'It is a good lease.' He says, 'You can't break your contract. There is no way you can get it back.' Said it would be tied up in court six or seven years and he says you would not win it in the long run. He says if I wanted an interest in the lease it would pay me to buy an interest.

Q. It would pay you to buy an interest?

A. Rather than have a law suit. I could not get it back any other way, so he said if I could buy it it would be the best thing.

Q. Did he say anything to you about what the value of it was?

A. I told Mr. Martin I would give them this \$5,000 and their money back if they would assign it over to me. He said he would go take it up with Mr. Bradshaw and Mr. McCullough and see what they said about it, and he went to see them and he told me they would not do it.

Q. What did he say to you about what the lease was actually in his judgment worth?

A. Well, after he came back, he hadn't said before then. After he came back from there, though, he told me he thought the lease was worth about \$100,000 in his judgment, he said."

Mr. Martin thought he had some influence on McCullough and Bradshaw and told Gilcrease that he could make them come across, Gilcrease testifies (page 351):

"Q. And you were figuring on trying to get a lease on it?

A. Yes, sir, and so it run along that way for a few days, I don't know just how it come; some one told me; I don't know how came them to tell me, but Mr. Brown he was going to put up a check for this lease, and it was going to be sold to the highest bidder. I understood Mr. Brown was going to put up a check there. Mr. Bradshaw would say that he had money for it, and they were going to take this lease. And so I told Mr. Martin, I says, 'I want to have Mr. Bradshaw discharged and another guardian appointed and have this lease sold.' Mr. Martin said, 'Well, no, there ain't any use in that,' he says. 'He is all right.' I says, 'I want to have him discharged anyway.' He said, 'I don't guess you ever thought about it,' he says. 'I can make Bradshaw come through all right,' I says. 'I can't make him come through,' I says. 'I don't know anything on Mr. Bradshaw,' I says. 'I don't know any reason you could make him do this.' Mr. Martin said, 'You never thought anything about it. If I just mentioned putting this big lease in the hands of a receiver down there he would be all right with me.' And so that was all that was said. I went out of the room where Mr. Martin was. I got to wondering why Mr. Martin could put the lease in the hands of a receiver, and so I went to looking into it a little.



Mr. Brown—Mr. Davisson had told me before then, Dan J. Davisson, told me about Al's interest down in the lease. I don't know how he got any interest in it, but it just come to my mind about what Mr. Martin said; what he had. I knew Mr. Bradshaw had always claimed to have an interest in it. He never did tell me just what interest he had in it. I went to looking it up and found out how it all happened."

Mr. Martin testified (see page 597):

"Q. At the time of the execution of that lease, or the time of the conversation preceding it, was your advice asked by Mr. Gilcrease as to its advisability from a business standpoint?

A. Either at the time or before the time; I believe it was before this transaction ever came up, Mr. Gilcrease had asked me my opinion as to his right to make the lease on his allotment, or a sale of it, and I had given it to him.

Q. What was that?

A. Mr. Gilcrease never asked my advice about the price of the lease or about the matter of selling it at all at any time.

Q. What advice did you give him as to the legality of his dealings with his lands?

A. I told him I thought he had the right to deal with his allotment."

At the time of these transactions and while Martin was acting as legal adviser and attorney for Mr. Gilcrease, he was also acting as attorney for Mr. McCullough and for Mr. McCullough's bank, and was a stockholder. Mr. Martin testified, page 592:

"Q. Do you know when you first became acquainted with the defendant G. R. McCullough?

A. I don't know the date.

Q. About the time?

A. Oh, I know the occasion. Mr. McCullough, my first introduction to him was that he was one of several parties in a case in which our firm was assisting Hurley & Gormley to defend and I was introduced to Mr. McCullough at a consultation in regard to that case.

Q. Had you been employed by Mr. McCullough or the other parties to that suit to assist Gormley & Hurley?

A. Judge Hainer had been engaged, I think, by either Mr. Hurley or Mr. Gormley, who were senior counsel in the case. Personally I had not met Mr. Hurley or any of the parties until this consultation that I refer to."

He further testified, page 658:

"Q. Do you remember when the Bank of Oklahoma was organized? A. I believe you said about June of 1909.

A. That is my recollection; I think that is right.

Q. You were one of the original stockholders of that bank?

A. Yes.

Q. Mr. Bradshaw was its cashier?

A. Yes, sir.

Q. Mr. McCullough was its president?

A. He was.

Q. You had had some personal business for Mr. McCullough before the organization of that bank?

A. Yes, sir.

Q. You had some legal business for that bank shortly after its organization, did you not?

A. We may have had; I don't recall what it was now, if we had.

Q. That Bank of Oklahoma afterwards became the Oklahoma National, did it not?

A. Yes, sir.

Q. When did that occur?

A. I don't know the dates, but it was in 1911, I think in the early part of the year.

Q. The Oklahoma National had for its cashier Mr. Bradshaw, didn't it?

A. Yes, sir.

Q. And for its president, Mr. McCullough?

A. Yes, sir.

Q. You were also a stockholder in the Oklahoma National?

A. Yes, I held a thousand dollars of the stock at first when it was first organized.

Q. After that the Oklahoma National merged with or took over the First National Bank of this place, did it not?

A. Well, Mr. McCullough and his stockholders in the Oklahoma National purchased a part of the stock of the First National and the Oklahoma National was liquidated and the First National took its business.

Q. Mr. McCullough became the president of the First National and Mr. Bradshaw the cashier of it when that happened?

A. That is correct, yes, sir."

Mr. Bradshaw testified, at page 725:

"Q. Mr. H. V. Martin was a stockholder in the Oklahoma National, was he not?

A. I think so.

Q. And he took stock in the First National?

A. Yes, I think so.

Q. So that you, Mr. Martin and Mr. McCullough have all been interested in the Bank of Oklahoma, the Oklahoma National and First National Bank?

A. Yes, sir.

Q. Since the organization of the Bank of Oklahoma?

A. Yes, sir."

Mr. Martin testified at the time a fourth interest in the lease was sold him and a fourth to Gilcrease (page 609):

"But I had a small account in Mr. McCullough's bank and Hainer & Martin had an account there. We were at that time doing business for the bank—had some—we were attorneys for the bank in some matters."

Prior to the time Gilcrease made his first lease to McCullough he had conveyed this land to his mother in trust for himself and when McCullough and Bradshaw discovered this, they employed Martin to secure a lease from her. Martin testifies at page 599:

"Q. When after the execution of the lease did you next have any conversation with Mr. Gilcrease or McCullough or Bradshaw or Brown in reference to the lease?

A. Well, it wasn't long. I don't know the day, but somebody at the bank—probably Mr. McCullough—either he or Mr. Bradshaw—called me up and called my attention to the fact that they had had an abstract brought down to date covering the land, and that there was a deed appearing in it that they had known nothing about it, had been executed by Mr. Gilcrease to his mother some time before purporting to convey this land, whether the title to his mother—they didn't know who she was, but it turned out to be Mr. Gilcrease's mother, Mrs. Lizzie Gilcrease. They told me they wanted me to see Mr. Gilcrease and see what he said about it, that evidently he didn't have any title; and Mr. Gilcrease then lived in the country. The first time I saw him I called his attention to the fact that there was a deed of record conveying away this title, and that Mr. McCullough wanted something done in regard to it, and Mr. Gilcrease told me that his mother would be willing to fix the matter. And he wrote her a letter and gave it to me and asked me to go to see her at Eureka Springs and for her—she was there at that time, I think, on a visit—and have her attend to it. I did that, and gave Mrs. Gilcrease the letter at Eureka Springs, and she said then it would be all right; she would doubtless fix it up, but before doing so she wanted to consult her husband and her son both, and she came back home at the time, and went away, she said to see Mr. Gilcrease and his father in regard to this matter. It wasn't very long, probably two or three days; it may not have been so long. Mr. Gilcrease and his mother came into the office and she said that she was willing to fix the matter up, and she executed a lease that has been introduced here."

Martin's firm, Hainer & Martin, were attorneys for Bradshaw in having him appointed guardian for Gilcrease (see petition for Appointment, Nomination of Guardian, Waiver of Notice by next of kin, and Order Appointing Guardian (pages 472 to 479)).

When Martin bought his fourth interest in the lease from McCullough, which he claims to have paid \$15,000 for, he did not have the money and did not want to borrow the money from Gilcrease, and although McCullough was selling very much cheaper than he considered the property worth, volunteered to lend Martin the money without security.

Mr. McCullough testifies, page 817:

"Q. Now, what was the arrangement as to the payment of the Martin interest?

A. Well, Martin didn't want; he talked it over. He said he didn't want to borrow the money of Tom. He said he didn't like to handle it; it was a bigger deal than he wanted to get in behind, although he thought it was a good trade, but he wanted to handle it on his own resources if possible. We discussed that and I told him that if he wanted to I would help him in it, and did help him.

Q. Just state what the actual agreement was and if it was to be

paid partly in money and partly on time; what part was to be paid in money and what on time.

A. Well, he arranged with me at that time to make a payment, he arranged to borrow some money of the bank. I was to carry some personally. He told me at that time that within a very short time that he expected to get in some fees and money from some source or other; that he would like to leave it stand open until he could see just exactly how much he could pay and how much he would have to borrow. Well, we did leave it stand open, I think for a couple of weeks or such a matter, and he wanted to straighten it up in some way, and he told me he had been disappointed in getting some money he had looked for, and the upshot of it was I had to loan Mr. Martin all the money, practically, that went into the payment of that lease. He had some. I don't know how much.

Q. Was the part that had to be paid in cash, was that paid in cash or by check?

A. That was paid by check?

Q. Was the check afterwards paid?

A. Yes, sir.

Q. How much was that, Mr. McCullough?

A. That was for \$9,000.

Q. That left what part of the purchase money unpaid?

A. Six thousand dollars.

Q. How was that evidenced?

A. Well, he gave me a note for it.

Q. Was that note subsequently paid?

A. Yes, sir."

Bradshaw never paid anything for his interest. Mr. Bradshaw testified at page 725:

"Q. You didn't pay but \$2,000 when you took this lease from Mr. Gilcrease in Mr. McCullough's name, did you; Mr. Gilcrease was only paid \$2,000 at that time, wasn't he?

A. Mr. Gilcrease was paid \$2,000, yes, sir.

Q. The remaining payments were to be made in \$500 installments?

A. Yes, sir.

Q. How much of that \$2,000 did you contribute?

A. I didn't pay anything.

Q. Didn't pay any of it?

A. No, sir.

Q. You testified on the hearing before that occurred when we applied for a receiver that you were interested in the lease from the beginning. There were several succeeding payments made before assignments were made by McCullough to Martin and Gilcrease that are in evidence here, amounting to some \$2,000 more. What part of that did you pay?

A. I didn't pay any of it.

Q. You didn't pay any of it?

A. No, sir.

Q. Do you know who did?

A. Mr. McCullough paid that.

Q. Mr. McCullough paid that?

A. Yes.

Q. When did you first pay anything on account of this matter and how much?

A. On account of which matter?

Q. This matter we are talking about right now, this lease?

A. Who to?

Q. Anybody.

A. Well, I don't remember the time I paid nor the amount."

We think a reading of the testimony will show conclusively to an unbiased mind that Martin never paid a cent for his interest in the lease, and to show this it will be necessary to set out the testimony of Martin and McCullough almost entire.

Mr. Martin testified, page 666:

"Q. Now, Mr. Martin, with reference to your check for \$9,000 that you have on the 22d of October, 1910, when these assignments were made from McCullough to you and to Gilcrease and which you have put in evidence here—that check bears date 22d of October, the same day that these leases were made, does it not?

A. Yes.

Q. It is stamped paid the 3rd day of November?

A. Yes, sir.

Q. Isn't it a fact that your account was overdrawn at the Bank of Oklahoma on the 20th day of October, 1910, by a hundred and thirty-odd dollars, and that it continued to be overdrawn from then down to the 3d of November, 1910, the day this check was stamped paid?

A. That is true, yes, sir (667).

Q. I will ask you if you didn't testify as follows, with reference to the matter, at the hearing we had upon the application for the receiver in this case: 'Yes, I looked around to see how much money I could get and I talked to Mr. McCullough as to whether or not I could get credit with him for a part of it and he said that I could, that he would, that if I wanted to buy it that he would carry me for some of it until I could pay it, and we finally agreed on that proposition; Mr. McCullough selling to me a fourth of it and selling to Mr. Gilcrease a fourth of it. I paid Mr. McCullough \$9,000, as I remember. It was this way; I didn't have that much money in the bank at the time, but I expected to have considerable money coming in. I had some money. I had some places I could get money besides, and just about that time Judge Hainer had closed up his relations with the Haskell case he had been in the prosecution, and of course the firm was entitled to the fee. He hadn't made—sent in a claim and corresponded with reference to the amount of the fee. His employment was that, that is fee should be fixed by the Attorney General after the services were completed, and the claim made by the Judge was \$10,000. I expected that that claim would be allowed, but it was not. It was cut down, I think it was to \$3,500, and that amount of money—I didn't get as much money from that as I had expected. However, I had a good deal of money coming from my business in the west side and some money, anyway, on hand. I gave

Mr. McCullough a check for \$9,000 and I told him I would have the money in the bank to meet the check in a few days, and I did. The check was paid I think maybe ten days after it was given. I also gave Mr. McCullough my note for \$6,000. I don't remember how long it ran now, maybe three months or more than that; at any rate it was renewed and payments made on it from time to time, and it is now all paid to him, but I borrowed some of the money to pay it from the bank, which I owe the bank, and maybe a bank in Kansas City. However, the transaction as far as Mr. McCullough is concerned and me, is closed up. We went along there after that was done till the Millikin lease expired, which was the 8th day of February, 1911.'

A. I think that is substantially what I said.

Q. You testified today, as I understood you, after the giving of that \$9,000 check you had some time subsequently, about the 3d of November, when that check was paid, arranged for a credit of that amount at the bank down there?

A. No, I didn't testify to that.

Q. That was what I understood you to say.

A. No, sir.

Q. What did you say?

A. I said I didn't have enough money coming in to meet the check; that I did have some money coming in, and that I borrowed some money from the bank; that I was unable to tell the items constituting the entire amount of money; that is what I said today and what I said now.

Q. You didn't mention in your other testimony anything about borrowing any money from the bank to take up that check.

A. I didn't in what you have read, Mr. West. I may have mentioned that in the testimony; I don't recall now whether I did or not.

Q. You say the other \$6000 was borrowed at the time you made this transaction?

A. Yes, sir; that is, it was not borrowed, but I owed that amount of money to Mr. McCullough.

Q. Didn't you testify in this that I have just read that you got \$6,000 and gave him your note for \$6,000?

A. Yes, that was for what I owed him in addition to the \$9,000 check?

Q. Didn't you testify in the other examination that you got \$6,000 of that money from a bank in Kansas City?

A. No, I got \$5,000 from the bank in Kansas City.

Q. Five thousand dollars?

A. Yes.

Q. Was that on your own note to that bank up there, or did you give the note to Mr. McCullough and did he send it up to the bank in Kansas City?

A. I don't remember now whether in the first place I gave a note to Mr. McCullough or the bank. At any rate, some time I gave this bank in Kansas City my note direct, that is the Commercial National Bank; I have since paid \$2,500 on the note and I still owe \$2,500 on it.



Q. Had you ever borrowed any money from that bank?

A. No.

Q. Were you acquainted with that bank?

A. No.

Q. Mr. McCullough got you the money?

A. It was on his recommendation.

Q. On his credit?

A. Yes.

Q. You still owe \$2,500 of that money up there?

A. Yes.

Q. At the time you testified in the receivership hearing you owed some bank here a like amount of money?

A. Well, no; I owed the bank here more than that. The First National Bank I owed at the time of this other hearing I think \$4,700 or \$4,600 perhaps, on my own notes, and \$2,000 on Hainer & Martin's notes. Since then I have paid \$2,000 on my notes and paid \$1,000 on the Hainer & Martin notes, is my recollection of the situation.

Q. Have you gotten that note back from the bank in Kansas City—the original?

A. It came back. I renewed it for a smaller amount when I made a payment on it. I don't know whether I have it or not. I don't keep cancelled notes ordinarily. I don't think I have it.

Q. If you have Mr. McCullough himself any note originally in this transaction, that note to McCullough you say has been paid?

A. Yes, it was paid.

Q. You got it back then, did you?

A. I think it was given to me.

Q. Do you know where it is?

A. I don't believe I have it I might have it, but I didn't at that time especially keep any cancelled notes. I tore them up when they were paid. I don't keep a note file at all, and if I have it it is merely accidental, and I don't know that I have it.

Q. And I believe I asked you about, when you were put on the stand as a witness for the plaintiff, if you had any stubs corresponding to this \$9,000 check, and you said you didn't.

A. The check is written on the stub blank and I didn't keep any personal stub book. Recently I have had a big printed—that is, a regular check book from the First National Bank. It has a stub book, but until then I never used a stub book.

Q. And you haven't got your bank pass book covering the period?

A. Not the old one. I have my pass book with the First National Bank for the last couple of years, I guess.

Q. I will ask you to look closer at that and tell me if it is not a Hainer & Martin check, that is, your name is signed to it, drawn on one of their checks, and if it is not torn out of a book with the name 'Hainer & Martin' printed on the—

A. Yes, but that hasn't anything to do with the stub, because the stubs were only kept for the Hainer & Martin checks, and if we took checks out of the back of the book or anywhere for other use than the firm account, you wouldn't fill out the stub.

Q. The reason I asked you that, Mr. Martin, you said a moment before that check was not written on a check that came out of a book, but on another kind of a check.

A. I think you may put me in error on that. I notice it is written on that kind of a check. I didn't remember that."

And Mr. Martin testified further, on page 690:

"Q. Let's go back now, Mr. Martin, to the \$9,000 transaction, and I would like for you to tell me the items, as nearly as you can give them, of which the \$9,000 that you say you put into the bank to meet that check, was made up, and where you got them?

A. I am unable to do that, sir; I can't tell you.

Q. You can't do it?

A. I know that I had some checks. I think I borrowed \$5,500 at the bank at the time; but it is absolutely impossible. I have tried to think of what it was, and I can't tell those items. I had no reason to charge my memory with it at the time, and I never had any reason to think about it until this suit was brought, and that was long afterwards, and I cannot remember what those items were.

Q. Can you give any items of considerable amount that went in; \$5,500 would still leave \$4,500. If you borrowed \$5,500 from the bank at that time?

A. It would simply be a conjecture if I did. I think—I have an impression, although I don't know it to be true, one of those things was Mr. Gilcrease's check for a few hundred dollars, but I don't know about that. I am unable to locate it definitely, but I think that included in that was one of his checks. He could probably ascertain if it was true.

Q. Do you frequently make deposits of your own money amounting to even as much as \$3,500 in one day?

A. I have done it very often.

Q. Very often?

A. Yes.

Q. Will you get your account and show us where you have done that at other times, of money; not money you collected for clients or anything of that kind, but money that belonged to H. B. Martin individually?

A. I think my account will show several transactions of that kind, yes, sir.

Q. How much was the check you think Mr. Gilcrease gave you?

A. I don't know, sir. I am not even certain his check was in the amount, but I think that it was.

Q. You don't know what it was for?

A. No, it was probably a Hainer & Martin check, if it was in there, and likely was on some of the obligations that he owed the firm. I will say this, too, Mr. West, that the money, Hainer & Martin money, didn't go into the firm account always. Sometimes I would use a check and sometimes the Judge would. We didn't keep this bank account very correctly as to the firm funds. We were a little careless about it, a little indulging to each other's needs at the time.

Q. What fee of any considerable size did you get for Hainer & Martin on the 3d of November, 1910?

A. I don't know. I say, if Mr. Gilcrease's check was in there, it was probably on account of one of the fees he owed to the firm. He did pay from time to time fees he owed the firm.

Q. You didn't have any big fees coming at that time from Mr. Gilcrease?

A. I don't think so.

Q. If you had any check of his it was for a small amount; it was not over \$100 or \$200?

A. It might have been \$50, it may have been several hundred dollars. Mr. Gilcrease has paid the firm some fees——

Q. This suit has been pending a little over a year, Mr. Martin, hasn't it?

A. Yes, sir.

Q. A good deal of this ground was gone over in the application for a receivership, now just about a year ago?

A. Yes.

Q. And inquiry was made of you about these things at that time?

A. It was, yes.

Q. You haven't been able to refresh your memory or to trace in the year that has elapsed anything about the sources from which you got that money?

A. I can't remember it definitely, sir. If I undertook it it would be guessing, and I might make a bad guess." (693.)

Mr. McCullough testified, pages 824-838:

"Q. When did the defendant Martin first begin doing a banking business with your institution, the Bank of Oklahoma?

A. I think it was shortly after it opened up.

Q. He was a stockholder in it from the commencement?

A. Yes, sir.

Q. Prior to the time of a sale by you to Martin and Gilcrease of an interest in this lease, had Mr. Martin's balance at your bank at any time ever been any considerable amount?

A. Well, I don't know that it had; I never looked that up to see.

Q. Well, it never had run over a very few hundred dollars at any time, had it?

A. Oh, I think so.

Q. At that time did you know anything about Mr. Martin's assets?

A. At the time—what time are you speaking of?

Q. At the time you were selling him and Gilcrease an interest in this lease?

A. Yes, I think I did.

Q. About what did you know that Mr. Martin had at that time?

A. Well, he had a good practice was one thing he was interested——

Q. Been here since late in the fall of 1908?

A. I don't know when he came here, but I had talked to Judge Hainer about him and satisfied myself he was absolutely all right.

Q. About what assets did you know of Mr. Martin having at that time?

A. I can't recall now just——

Q. Can you recall of a single piece of property on earth you knew he owned?

A. I can't recall it now.

Q. Did you at that time know of any property that Mr. Martin owned outside of his household goods and law library?

A. I satisfied myself at that time thoroughly that I wasn't taking any chances on Mr. Martin.

Q. He rented his home here in the city?

A. I don't know.

Q. You didn't know of his owning any property here in the city at that time?

A. I don't know; he owns his home now. I don't know whether he did then or not.

Q. And you didn't at that time know of any assets that he had excepting his law library and his practice?

A. I think I have answered that pretty thoroughly. I told you that I couldn't tell you of any specific property that he owned.

Q. Did you know that he had anything?

A. I satisfied myself fully as to whether Mr. Martin was entitled to any credit, if that is what you are getting at.

Q. But you can't call to mind that you knew at that time that he had any property at all, can you?

A. I don't recall of any specific piece of property, no. Don't know now, I couldn't tell you now; only he happens to own the house I used to live in.

Q. And at that time you made an arrangement with him, at the time you made this transfer to him and Gilcrease, made an arrangement with him that he would pay you a certain portion of the purchase price in cash and give you a note for the balance?

A. Yes, sir.

Q. But at that time the amount was not determined as to how much he would give you in cash, nor how much—it was to depend on how much money he could put in?

A. I think it was; I think we agreed at that time how much I was to loan him. He was depending on getting in the balance of the money from some other sources, and then when the time did come probably I loaned him more money than I figured on at the start of it; I remember that.

Q. Do you recall how much money you agreed to loan him at that time?

A. I think it was \$5,500, or something of that kind.

Q. Now, were you to make that loan individually or were you to loan it for the bank?

A. I was loaning it for the bank.

Q. But you had afterwards to loan him a greater sum of money than that?

A. Yes, sir.

Q. Well, did you loan him \$5,500 at that time?

A. No; I let the matter stand open for a few days to wait to see what he got in in the way of collections?

Q. About how long did you let it stand open before you made the loan?

A. My recollection is, a couple of weeks.

Q. And at the expiration of a couple of weeks you loaned him about how much?

A. I can't tell you the exact amount, but my recollection is that it was in the neighborhood of \$7,500 or \$8,000, I don't remember.

Q. And what security did you take to the bank on that loan?

A. I took his note.

Q. Just his personal note?

A. Yes, sir.

Q. And you took his personal note for \$6,000 at the time?

A. I did.

Q. So that when you made him this loan he gave you some cash to make up the balance?

A. Yes, sir.

Q. But you don't know the amount of that loan?

A. He gave me a check for the whole thing. He made up the balance, whatever it was, up to the \$9,000. I don't know where he got that or anything about it.

Q. And that loan was made by the bank?

A. I think I divided that loan. I think I sent part of it to Kansas City and kept part of it here. I don't remember about that.

Q. Well, the loan, whatever it would be, was not made by the Kansas City Bank; it was made by this bank and then by this bank endorsed over to the Kansas City Bank?

A. It was made to the bank. They carry those things on my recommendation. If I send them a note they take it without any recommendation.

Q. And your recollection is now that Mr. Martin made this note direct to another bank in the first instance?

A. No; I think I divided the loan. I think that I carried \$5,500 here with this bank and the balance of it was carried out of town.

Q. Do you know by what bank it was carried?

A. By the Commonwealth, Kansas City.

Q. The Commonwealth National, Kansas City?

A. Yes, sir.

Q. It was divided, as you recall now, in two loans?

A. I think it was, yes.

Q. Do you recall so that you can distinctly remember the fact that the Commonwealth National Bank of Kansas City loaned Mr. Martin some money about that time?

A. Now, it might have been the National Reserve Bank. At any rate it was—G. M. Smith was the man I dealt with; it was one of those banks.

Q. You are absolutely certain of the fact now one of those banks arranged through G. M. Smith to take up Mr. Martin's loan for a part of this money about that time?

A. I think so, yes.

Q. You are certain of it?

A. Well, that is my recollection that that is the way it was handled. I know I have borrowed for Mr. Martin of that bank and those two banks, and I think possibly the Bank of Commerce a number of times. He has a note up there now.

Q. And as a matter of fact isn't it true that they never carried any of Mr. Martin's paper until you consolidated with the First National Bank?

A. No, I think they did.

Q. You think they did?

A. Yes, sir.

Q. Are you certain they did?

A. I think I am, yes, sir.

Q. And you are satisfied that your bank prior to the time of the payment of this check took Mr. Martin's paper for some \$5,500?

A. Here, you mean?

Q. Yes.

A. Yes, sir, I know I made him a loan of something like that amount.

Q. Does that loan appear upon any of the books of your bank?

A. There isn't any of our loans appear on the books of the bank.

Q. You don't keep any note or bill payable register?

A. I didn't, no, sir, at that time.

Q. You didn't keep any bill payable register at that time?

A. Bills payable register?

Q. Bills payable register. Was that while you were a national or a state bank?

A. State bank.

Q. So that there is no record of any book of your bank that you made a loan to Mr. Martin of \$5,500 about that time?

A. There isn't any record we made anybody a loan of any amount for the reason that the manner in which we handled that branch of the business—

Q. Do you know the date, or is there in your bank or among your records anything that will show the amount or the date at which you let Mr. Martin have that money?

A. Why, no, sir, I don't suppose there is, outside of Mr. Martin's account.

Q. Have you no statements of your bank as to the bills receivable between the 22d of October and the 3d day of November?

A. Bills receivable?

Q. Yes.

A. Well, I don't know.

Q. Have you no schedule or record by which you could tell when any note became lost, or what number of notes you had or by whom they were payable?

A. We keep our notes in duplicates and keep a copy of every note and kept them in separate cases.

Q. And that was the only memorandum you had by which you could tell what notes you had in the bank?

A. Yes, sir.



Q. Do you know whether the \$5,500 you loaned Mr. Martin was credited to his account upon the day that it was loaned?

A. No, I suppose it was; I don't—

Q. Did you keep any cash book about that time?

A. No, sir, we have no cash book.

Q. Did you keep any record or memorandum of the amount of cash that came into the bank or that was paid out of it?

A. Nothing more than the balance sheet the boys used each day; they balance up their cash.

Q. Would there be in your bank any record showing whether or not the \$5,500 was the property of the bank or was a deposit in the bank?

A. I don't believe I understood your question, sir.

Q. You say that you loaned Mr. Martin out of that bank \$5,500?

A. I think that is the amount, yes.

Q. Would there be in your bank any record that would show whether or not that \$5,500 which would remain in the bank was the property of the bank or was the property of Mr. Martin?

A. Certainly; we would have the note and his account would have credit for the proceeds.

Q. That would be the only thing, would be his note?

A. That would be all.

Q. And the only entry on the bank books would be an entry to his account?

A. I think that is right, yes, sir, on our ledger and on his bank book.

Q. And you used the loose leaf system of ledger?

A. Yes, sir.

Q. Did you never make up any statements of schedules of the bills receivable in the year 1912?

A. Oh, yes, we balanced them up.

Q. Would they show who owed the notes?

A. No.

Q. Just simply be a list of amounts?

A. Yes, sir.

Q. When you passed the \$5,500 to Mr. Martin's credit, was there a corresponding entry made in any other account of the bank?

A. That deposit was all made at the same time. When he got ready to close the deal up and fixed it all up at once, the deposit was \$9,000.

Q. Under the system of bookkeeping you had, was there no other entry made on any of the books or records of that bank?

A. It was credited on his pass book, yes, and put on our deposit ticket and put on our ledger.

Q. And on the ledger?

A. Yes, sir.

Q. That is to his account?

A. Yes, sir.

Q. But would there be no other in there than to his account?

A. None whatever.

Q. There was no charge of that amount when you gave him

credit for it; there was no corresponding charge made anywhere to any other account?

A. Yes, whatever amount of cash he put in, whatever amount of notes, of course, offset his deposit.

Q. But there was no other record made of it?

A. I don't know. I don't see the necessity of it.

Q. You didn't charge bills receivable with that amount of cash?

A. With that amount of cash.

Q. Yes.

A. We charged bills receivable with that amount.

Q. You charged bills receivable with that amount?

A. Yes.

Q. Where is that bills receivable account?

A. We don't have any book of it.

Q. What was it?

A. It was a lump amount; the entire one item.

Q. Have you a book in your bank in which you keep a bills receivable account?

A. No, sir.

Q. Did you at that time?

A. No, I think not.

Q. Then where was the memorandum that is charged to bills receivable, that \$5,500?

A. I suppose there was some record of that; of course there would have to be a record of the total amount of bills receivable.

Q. Where would that be?

A. I suppose it would be in the bank.

Q. And bills receivable account, charged with the amount of Mr. Martin's—

A. It would be all in one item, of course it would show on our books somewhere, yes.

Q. It would show on your books just simply as the total amount of bills receivable.

A. The total amount of bills receivable.

Q. That would be all it would show?

A. If a note was paid the copy was stamped paid and turned in to the clerk; if a new note was made the new copy was turned in to him so he balanced that—

Q. And he made an entry upon some book of the bank?

A. If it was renewal, there would be no charge then.

Q. But whenever a note was made he made some entry upon some book of the bank of the amount of that note?

A. Why, yes.

Q. No, on what book did he make it?

A. I don't know.

Q. You don't know how that note was kept at all?

A. No, I don't know.

Q. Can you have the books procured here?

A. I don't know that I can.

Q. Why, I haven't seen it: I don't know anything about it.

Q. You have never seen any such book?

A. No, sir.

Q. Then you don't know it existed?

A. No, but naturally there would be some record of it, of course.

Q. You don't know what kind of a book or what kind of an account the bills receivable were kept in your bank?

A. Of course, we had to keep the total amount of our bills receivable.

Q. Now, was there any record kept in that bank which showed the amount of cash on hand and the amount of bills receivable, so that you could make up your statement of assets from it?

A. Yes, sir.

Q. You kept that in some way separate, then?

A. Yes, sir.

Q. Kept a cash account?

A. Yes, I suppose you would call it a cash account.

Q. Would that cash account show the amount that was on deposit in the bank?

A. Show the amount of cash, actual cash, we had in the bank.

Q. But it wouldn't show how much was from depositors' accounts or how much was in the bank?

— The deposits would be shown, the total amount of cash in the bank and the total amount of cash with corresponding banks.

Q. Do you recall the date of the Martin note to the bank?

A. No, sir.

Q. Do you know when it was paid, this \$5,500 note?

A. No, sir.

Q. Was there any security given to you for the \$6,000 note?

A. No, sir.

Q. Calling your attention to Defendants' Exhibit 3, when did Mr. Martin give you that check?

A. It is dated on October 22, 1910.

Q. Is that the date that he gave it to you?

A. I can't tell you; I presume it was.

Q. It is marked paid on November 3, is it not?

A. Yes, sir.

Q. Was that check paid by your bank on that date?

A. Yes, sir.

Q. The check bears your endorsement; was the check paid directly to you?

A. Yes, sir.

Q. In what way was it paid to you, Mr. McCullough?

A. In what way was it paid to me?

Q. Yes, sir.

A. Let me understand your question.

Q. I want to know in what way that check was paid to you; did they hand you out the currency?

A. No, sir; I took credit for it.

Q. You took credit for it on the books of the bank?

A. Yes, sir. (835.)

Q. And have you your pass book covering that day?

A. No, sir.

Q. Have you your account of that date?

A. No, sir.

Q. Has the bank your account of that date?

A. Yes, sir, I think so.

Q. Have you brought those books into court?

A. Yes, sir, I brought all the records.

Q. I will ask you to bring me that account. I will ask you to examine this book which you have produced and turn to your account for the month of November, 1911.

A. November?

Q. Yes.

A. I will say to start with that the Bank of Oklahoma was liquidated something over two years ago, every account was balanced and new pass books were issued and the old ones were taken up. If you remember, in the trial of the other case, the receivership case, you called for this account. We took you and Mr. West down to the bank and showed you the record, and you asked for a copy of these accounts and they were given to you at that time, from October 1 up till some time in November. Now you remember also the condition of those records at that time. You had quite a difficulty in finding what you wanted. They were not down in book form like this, but were absolutely loose and stored away under the counter and everywhere. Now the only thing I have been able to find is this book with reference to this matter. This commences here on November 21st, 1910, and goes down to February or March, 1911.

Q. You say it begins in November, the 21st?

A. Yes. Now you have a copy of these accounts and examined them yourselves from October 1st up to this date.

Q. I will ask you, have you any of the books or records of your bank showing your account, your personal account with that bank up to and including November 3d?

A. Unquestionably, yes.

Q. I will ask you to produce it.

A. I am unable to do it, sir. I have searched last night and this morning both. As I told you, those were records we had absolutely no use for; they had been stored away in the basement of the vault. We have had four consolidations extending back over a period of ten years, and if you and Mr. West will remember the condition of those things and the trouble we had in finding them once before, a year ago. At that time you examined them and took copies, and I think you have the copies, because you referred to them this morning.

Q. Referring to this transaction a year ago, I will ask you if upon that examination you were not asked then to produce this identical account?

A. And we gave you a copy of it and showed you the record.

Q. And isn't it a fact that you said at that time you would produce the books in court?

A. No, sir; you didn't ask for them that I know of. You were perfectly satisfied. You came there yourself.

Q. And then wasn't it that the stenographer of the court was sent down there to get those accounts and you told him to go to hell, you weren't digging up evidence for Gilcrease?

A. The reporter of the court won't say so. He is right here, and he won't say so.

Q. We will see.

A. I never said that to a man in my life.

Q. Now, isn't it a fact, Mr. McCullough, that at that time that account didn't show any credit of the \$9,000 either on, before or after the date of November 3d within a month?

A. Yes, sir, it showed that and you know it. You saw it yourself with your own eyes and know it absolutely.

Q. And isn't it a fact, Mr. McCullough, that at that time that the only entry that could be found of that \$9,000 on the books of the bank was on the 3d day of November, at the last end of Mr. Martin's account, \$9,000 credit and right immediately opposite \$9,000 debit, not changing his balance a particle?

A. That is a fact, yes.

Q. And that was absolutely the only entry on that date of a \$9,000 item?

A. On his account.

Q. On his account or anybody else's?

A. Yes, it was on my account and you know it, and you looked at it and got a copy of the account.

Q. Have you the books and records of your bank that you can produce here showing the bills receivable account for October and November of 1911?

A. Nineteen eleven?

Q. Yes, sir.

A. What time in 1911?

Q. October and November, 1911.

A. I presume I have. I haven't looked.

Q. Nineteen ten, I mean.

A. That would cover this part of it here, if that is what you mean.

Q. Has that got the bills receivable account in it; that is what I am asking for?

A. I don't know anything about that record. I never kept it, and I don't know anything about it.

Q. Well, can you have that book produced?

A. I can try to have it produced. I can't tell you. I will make an effort.

Q. Mr. Martin's account on that date, November 3d, was already overdrawn, was it not?

A. I think that is what it showed, yes, sir.

Q. And it was overdrawn the same amount according to the books of your bank that night when you closed business?

A. Yes; I don't think there was any change.

Q. And opened up overdrawn the same amount the next day and remained overdrawn for some time thereafter?

A. Well, I don't remember about that.

Q. Until some time thereafter he got a half of the fee in the Haskell case and deposited \$1,275?"

And further on page 847 as follows:

"Q. Mr. McCullough, these accounts, books and so forth that are in the banks are the books of the bank that have gone out of existence, are they?"

A. Yes, sir, records we have absolutely no use for whatever.

Q. When these banks became consolidated, you transferred the total amounts from the books of the old bank to the books of the new bank?

A. Yes, sir.

Q. And had no further need to recur to the books of the old bank?

A. No, sir; every account is balanced out and closed and pass books were taken up and new ones issued.

Q. New pass books issued and the accounts carried onto the ledger of the bank which has absorbed the previous bank?

A. Yes, sir.

Q. It was asked you, Mr. McCullough, if the credit to Martin of \$9,000 which is simply on the statement of his account as a lump sum of \$9,000?

A. Yes, sir.

Q. If a man goes into a bank and deposits \$9,000, how would it otherwise appear, or different than it was entered on this account?

A. It would not appear any different.

Q. That would be the usual and ordinary way of entering it?

A. Yes, sir.

Q. You say you have looked for your individual account during the first part of the month of November, 1911, is it?

A. The leaves just preceding this record here are the ones I was unable to find, and they are the ones that were loose, unbound.

Q. And you looked for it and you say you couldn't find it?

A. Yes, I was unable to find those.

Q. But you did, you say, at the other trial show that account?

A. Yes.

Q. To Mr. Biddison?

A. Yes, sir, these two gentlemen. Mr. West and Mr. Biddison came right in our office and hunted these accounts up, or we hunted them up for them and showed them to him and made copies of them.

Q. Did your account show a credit to your account on the 3d day of November, 1910?

A. Yes, sir.

Q. And you mentioned that they saw it themselves?

A. Yes, sir.

Q. They saw that themselves and they took the statement. They took a copy of the statement?

A. Yes, and this is the first time I have ever heard of any different. They made no complaint at the other time about not seeing them."

And further on page 851 as follows:

"Q. I will ask you if on the examination by your counsel, Mr.



Gilbert, at the hearing upon the application for a receiver, you didn't give the following testimony:

Q. Your books do show Mr. Martin paid to Mr. Grant R. McCullough \$9,000 on the 3d day of November, 1911?

A. The books don't show who this was paid to.

Q. They do show there was \$9,000 paid by Mr. Martin to someone?

A. Yes, sir, there was a check paid of \$9,000 on that day. Wasn't that your testimony?

A. That is my testimony. The check was in evidence, showed who the check was paid to. The book doesn't show a single item of who it was paid to.

Q. Now, then, at that time, wasn't this question asked by Mr. West: 'I would like to ask further that you produce Mr. McCullough's account of November 3d, 1910.' And Mr. Gilbert says: 'No objection at all. The books and bank and everything else you have got you can have.' The Court said: 'Bring them up, Mr. Bradshaw, so they can be filed.' Mr. Gilbert: 'That is all'? I will ask subsequent to that, when the stenographer went down to get those you didn't absolutely refuse?

A. No, sir.

Q. To let him have anything to do with it, or furnish him any information in regard to it?

A. No, we did not. We had trouble in finding these records and it took us so long to find them you and Mr. West came down there and we found them together, and you know it, and you examined the accounts.

Q. Mr. McCullough, do you say you were there in the bank and present with Mr. West and I watching?

A. I was in the bank. I was up in my office in the bank and you and Mr. West and Mr. Bradshaw and some of the clerks were in there hunting for this stuff.

Q. We were in the vault?

A. Yes, sir.

Q. And you were up in your office?

A. Yes, sir.

Q. And there was no conversation between us and you were not present in the vault when you saw what we examined.

A. No, I know."

Mr. J. D. Payne testified on page 854 as follows:

"Q. Are you the same stenographer that took the evidence in the Gilcrease case on the application of the hearing for a receiver?

A. Yes, sir.

Q. Did you go to the bank of Mr. McCullough for the purpose of getting a copy of the statement of the account of Mr. Martin and Mr. McCullough, or either of them?

A. I called on them for the copy of the account of Mr. McCullough and Mr. Martin of the dates a statement I had with me then showed, and I took that from the record of the case. I don't remember those dates now.

Q. Did you have any conversation with Mr. McCullough and ask

for these accounts in which he told you to go to hell, that he wasn't furnishing evidences to Gilcrease?

A. I don't think he used that language.

Q. What did he say?

A. I don't remember whether it was Mr. McCullough or Mr. Bradshaw, but they told me that I couldn't have the accounts; that they weren't furnishing Tom Gilcrease any evidence.

Q. Do you know whether that was Bradshaw or McCullough?

A. No, I don't remember, but they were both right there together.

Q. You say you had a statement of the account?

A. No, sir; I had a statement of some things that had been asked for on the trial of the case in the record, and which I understood I was to get and put in the record.

The Court: You what?

A. I understood I was to get these things and put them in the record, but they were not produced on the trial.

Q. Did you tell Mr. McCullough or Mr. Bradshaw who sent you or if you came under the order or direction of the court, or anything?

A. No, I told them I wanted these things because they had been asked for on the trial; they were asked for on the trial.

Q. They were asked for on the trial before the examination of the accounts of Mr. Biddison, had they, or before you got in possession of the statements you did have?

A. The demand was made at the hearing; while I was making up the record I wanted these things to complete the record.

Q. And on that occasion didn't Mr. Bradshaw tell you that Mr. West and Mr. Biddison already had copies of them.

A. I don't know; they said something about Mr. West and Mr. Biddison being down there, but I don't remember what it was."

P. C. West testified, page 862, as follows:

"Q. You were present at the hearing of the application for a receiver in this case?

A. Yes, sir.

Q. Representing Mr. Gilcrease?

A. Yes, sir.

Q. I will ask you if at any time there has been given to you or has come into your hands any statement of the account of G. R. McCullough in the Bank of Oklahoma for the months of October and early part of November, 1910?

A. No, sir, there never has been at any time furnished to me any copy of that account, and I am very positive that I have never seen at any time any copy of that account, or what purported to be a copy of that account. I recollect that after we had concluded most of the evidence, possibly all of it, I know it was pretty late in the evening. You and I went with Mr. Bradshaw down to the bank and went into the vault and that I did see the original, or what purported to be the original of Mr. Martin's account, but I have no recollection of at that time, or at any other time seeing Mr. McCullough's account, and I know that no copy of it has ever been furnished to me, and I have never seen a copy of it. There was brought up to the court

room, if I recollect correctly, a statement of Mr. Martin's account showing the check on one side and the deposits on the other which had all the items in it that were on the account. That I saw down at the bank for the period covered, but wasn't in the same form that it appeared on the sheet like this down at the bank.

Q. I will ask you in what form or in what manner the \$9,000 debit and \$9,000 credit on the 3d day of November appeared on that account that we saw in the vault of the bank?

A. The sheet as I recollect it, was one similar to this and the items were across the page, and on one of these columns here appears \$9,000 credit and a \$9,000 debit immediately together and the extension of the balance of that day was exactly the same with or without that item—those two items."

Mr. A. J. Biddison testified on page 866 as follows:

"A. Have you been an attorney in the case ever since the inception of these proceedings?

A. I have been.

Q. Were you present at any part of the receivership hearing that was had about a year ago?

A. I think at all of it. I may have stepped out of the room for a moment or two; I was there most of the time.

Q. To refresh your recollection, isn't it a fact that during the first day, or part of it, you went away somewhere and then that you came back and remained with us until the proceedings were concluded?

A. That might have been the situation. I know I was there during a considerable portion of it. I don't recall; I had given attention to it for some time, I know.

Q. Were you there at the time the matter of the payment of the \$9,000 by Mr. Martin to Mr. McCullough was inquired into?

A. I was.

Q. Do you recollect going to the First National Bank building and making an examination of records down there?

A. I do.

Q. Do you remember who was present at that examination?

A. Mr. West, yourself and Mr. Bradshaw took up into the vault, as I recall, and called some clerk whose name I didn't know and don't know that I would know it now. It might have been some man I was well acquainted with, but some other person; and Mr. Bradshaw went out of the vault during most of our examination and left us with this other party. He either went out of the vault or stepped back toward the door of the vault, I don't recall which.

Q. Do you recollect whether at this time you saw the account of H. B. Martin covering the period from about the 20th of October to some days after the 3d of November?

Q. How was that account with reference to there being an entry of a debit and credit of \$9,000?

A. There was on the 3d of November in opposing columns a credit below another entry, as I recall it, just an entry of \$9,000, and then on the debit side an equal entry of \$9,000 just entered on that day.

Q. Do you recollect whether you saw at that time the account of G. R. McCullough?

A. I do.

Q. And what did it show?

A. It didn't show any entry of any item of \$9,000 during the month of November, 1910.

Q. Did you ever then or at any time thereafter obtain a copy of that account, or what purported to be, of the account of Mr. McCullough?

A. I never did. I never saw any statement of that account any time or place other than what appeared on that sheet or sheets.

Q. Did you receive then or some time subsequent thereto, or about that time a statement or Mr. Martin's account covering the period we have been talking about, Mr. Biddison?

A. I wouldn't be certain just when that was furnished, but there was furnished about that time, either to you or I—it came under my observation an account or a statement of H. B. Martin's account, my recollection is that you had that in your possession when we went to the bank. I might be mistaken about that.

Q. What is your recollection about that having been brought up to the court room by some one from the bank?

A. Yes, it was brought up by some one representing the defendants or the bank, and I think turned into your hands. I don't think I ever had custody of it.

Q. Isn't it a fact you did have it here the other morning when I came up here; it was in your files?

A. That might have been the situation.

Q. Is that the paper you have reference to?

A. This is the paper I have reference to. This statement is the only statement of Mr. Martin's account I ever saw outside of the bank book down there.

Q. Mr. Biddison, I notice on this statement here some figures here in pencil; do you know who made those figures on there?

A. I don't. They are not in my handwriting, and I don't know who made them. They were not in the statement originally, but they were memoranda, as I recall it, made either at or shortly after the time that we went down and examined the record of Mr. Martin's account.

Q. Is this statment showing the debits and credits on Mr. Martin's account from October 20th to November 7th, inclusive, in the precise form that it appeared. In other words, is it a copy of the ledger page that we saw down there, or is it merely a statement of the items contained in that ledger?

A. This is merely a statement, and as I may say a correct statement of the items as they appeared, but it is by no means a copy, nor does it show the manner in which that account was kept there.

Q. And the precise way in which those entries appeared?

A. No, it doesn't show that at all; it *is* doesn't show that method.

By Judge Diggs:

Q. Do you know who made this, Mr. Biddison?

A. That statement?

Q. Yes.

A. No, I didn't see it made.

Q. It was made either by the bank or some one connected with the bank.

A. I assumed by the bank. It was brought up by somebody representing the bank or the defendants, I don't recall now just who."

\* \* \* \* \*

951 In the Supreme Court of the State of Oklahoma.

No. 5773.

THOMAS GILCREASE, Plaintiff in Error,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, and AL BROWN, Defendants in Error.

*Response of Defendants in Error to Petition for Rehearing.*

May it Please the Court:

While the petition for rehearing presents and argues no new question for the consideration of the court, but is, substantially, in effect an attempt to present and argue questions that have heretofore been elaborately presented, briefed, and argued to the court, and by the court carefully considered and decided in an opinion which discloses a thorough consideration of the questions involved and a more than ordinarily minute acquaintance with the record, we have deemed it best not to let the petition for rehearing pass unnoticed lest silence might be taken for acquiescence.

The plaintiff in error seems mainly to base his application for rehearing on propositions which may be formulated as follows:

(a) Plaintiff contends the court was wrong in construing the Act of May 27, 1908, in reference to the effect to be given to the roll or census card offered in evidence.

(b) Plaintiff contends that this court was in error in holding that there was no fraud committed in the transactions set up in the petition filed in the cause.

(c) The plaintiff contends that the court was in error in holding that the instrument bearing date of February 8, 1911, was a lease, was based on a consideration, and was not fraudulent.

And, of these, in their order:

A.

Plaintiff contends the court was wrong in construing the Act of May 27, 1908, in reference to the effect to be given to the roll or census card offered in evidence.

The construction of the Act of May 27, 1908, was fully argued in the briefs of the parties to this cause, and before the court on oral argument, and, after considering such briefs and argument and the authorities cited in support thereof, this court reached the conclusion that the correct construction of such act was, when the enrollment record failed to disclose the exact date of birth but did disclose the date of enrollment, Indian citizens should be considered of the age shown by the enrollment record at any time within twelve months prior to the enrollment. In our judgment, this is the correct construction of the Act.

In our original and supplemental briefs on file in this cause, this question was fully discussed by us. To that discussion and the discussion of it by the court in its opinion in this cause, we have nothing new to add and no further argument to advance except to call the court's attention to the fact that the law, as announced in the opinion in this cause, had become the law of this jurisdiction prior to the rendition of the opinion in this case, and was so announced in *Heffner v. Harmon*, not yet officially reported (159 Pac. 651), and this doctrine announced in *McDaniel v. Holland*, 230 Fed. 945, which was cited with approval in the opinion in this cause and in the *Heffner* case has since then been re-examined and re-affirmed by the Circuit Court of Appeals of this circuit in *Etchen v. Cheney*, 235 Fed. 104.

It, therefore, seems that, when the enrollment records show that an Indian was nine years old on a certain day, without disclosing the date of his birth, it follows that he was nine years of age on that date, and such records are not evidence that he became nine on the day of enrollment, but, instead thereof, established the fact that he became of such age at some time within twelve months prior thereto. This is the established law in this jurisdiction, and we feel that any further argument of the proposition will be a trespass on the time and patience of the court.

#### B.

Plaintiff contends that this court was in error in holding that there was no fraud committed in the transactions set up in the petition filed in the cause.

The question of fraud in fact and in law presented by the pleadings in this cause was fully argued, both orally and by brief, to the trial court, who heard the witnesses testify and saw their manner of testifying and deportment on the stand. Such questions have also been briefed in the two briefs of plaintiff in error in this cause, and in the two briefs of the defendants in error in this cause, and fully and ably presented to the court on oral argument. The trial court, with the advantage it had of observing the manner and demeanor of the witnesses on the stand, and this court have both decided that there was no evidence tending to support the allegations of fraud. In our original brief and in our supplemental brief, we have gone fully into the question of fraud



and the value of the lease, giving not only a synopsis of the evidence on these questions but practically giving all the substantial evidence contained in the record in full.

Any unbiased mind, fully conversant with the record, must come to the conclusion reached by this court in its opinion in this cause, that there is no evidence supporting the allegations of fraud, but, if we should concede, for the purpose of argument, that the record does contain evidence of fraud, the trial court having found against such issue, this court will not overturn the finding of the trial court on that question unless an examination of the record discloses that the finding of the trial court was against the weight of the evidence. The finding of the trial court, as shown in our original and supplemental briefs, not being against the weight of the evidence, but in accordance with all the evidence in the cause and at least supported by the weight of the evidence, this court cannot disturb such finding without overruling a long line of adjudications in this jurisdiction. This, we do not anticipate the court will do, and we believe a further examination of the entire record in the cause will, if possible, more thoroughly convince the court and strengthen it in its opinion that there is no substantial evidence of fraud in the cause.

It is again contended by the plaintiff in error that the lease of February 8, 1911, should be declared void on account of the relation of attorney and client, which it is insisted existed between Mr. Martin and Mr. Gilcrease at the date of entering into such agreement. No new authority is cited, no new argument is advanced, in support of this contention, and it is based on the same argument and rested on the same authorities as originally cited and advanced to sustain the contention when first made.

In addition to the reasons given and arguments presented in our original briefs in this cause, and the reasoning of the court in its opinion in this cause, we say that, even conceding the correctness of the argument of the plaintiff in error as a general rule, it has no application to this cause. No authority has ever yet held that the relation of attorney and client rendered absolutely void any contract or agreement entered into between persons sustaining such relation. It appears from the record in this case that, after the making of the lease of February 8, 1911, and within a few months of the bringing of this suit, Mr. Gilcrease, who was then in possession of all the information, both as to the law and facts of this case, which he had at the time of bringing this suit, bought back from Martin the interest, or the major part of the interest, acquired by Martin under such lease. The record of this cause in this court shows that, after the trial of the cause, and after the pendency of this appeal in this court, Gilcrease adjusted all of his differences with Mr. Martin, reserving only the right to proceed for the recovery of the leasehold interest against McCullough, Bradshaw and Brown.

It is not contended, it cannot be contended, in the face of the record in this case, that, when, on the 11th day of December, 1911, Gilcrease bought from Mr. Martin three-fourths of Martin's interest

in the lease just sixty-five days before the bringing of this cause, he did not then know every fact he claims to have known on the date the suit was brought.

It is, therefore, evident that whatever of merit there may have been in this contention of plaintiff in error, it has ceased to be a question of interest in this cause. The transfer to McCullough could not be affected by the relationship existing between Martin and Gilcrease, unless it should be found that such interest was knowingly obtained by them by means of the relationship existing between Mr. Martin and Mr. Gilcrease; in other words, obtained by means of the alleged conspiracy and confederacy set out in the petition. This conspiracy and confederacy and fraud, the trial court and this court alike found did not exist. Gilcrease having acquired Martin's interest in the lease, and having released Martin from any real or supposed obligation to account to him by reason of the transaction, has now no ground of complaint on the ground of relationship existing between him and Mr. Martin. Gilcrease having acquired the sole interest that could by any possibility be construed to be subject to the fiduciary relation of attorney and client, there is not, and cannot in the nature of things, be any place now in this cause to apply the rule that dealings between attorneys and clients, in reference to the subject-matter of suits, will be scanned with a jealous eye.

### C.

The plaintiff contends that the court was in error in holding that the instrument bearing date of February 8, 1911, was a lease, was based on a consideration, and was not fraudulent.

Considering the lease of February 8, 1911, separate and apart from the other contracts and agreements shown in the record, it is evident that it is not subject to any of the attacks made on the instruments which precede it. On February 8, 1911, Thomas Gilcrease was of age in fact as shown by his admissions on the stand, and was of age within the purview of the Act of May 27, 1908, and, consequently, under any view of the law, had a right to make any contract, conveyance, or disposition of property owned by him that any other person or citizen of Oklahoma would have a right to do, even to the giving of it away, as has been frequently decided by the Supreme Court of this state, the United States Supreme Court, and other courts.

The instrument bearing date of February 8, 1911, is without doubt an oil and gas mining lease, contract, or covenant, as such instruments are variously termed by the courts dealing with them and defining their nature and character. In addition to the authorities presented by us on this question, in our supplemental brief, and the authorities cited by this court, in its opinion, we desire to call the court's attention to the case of *Commings v. Guaranty Oil Company*, 154 Pac. 882, decided February 5, 1916, and reported after the

filing of our brief. In passing on the question, the Supreme Court of California say:

"Respondent has all along contended that the agreement which we have called a lease did not amount to such, but we think that it should properly be so termed. Any matter of mere form or designation which the parties may give to a document will not change its legal effect."

The third head-note in the case is as follows:

"An agreement between the holder of land under a contract of purchase and a second party, providing that the second party shall take possession of the land and develop oil thereon, rendering to the other a portion of the product in payment of its use, is a lease, irrespective of its form or the designation given it by the parties."

That such instrument constitutes a lease is admitted by the plaintiff in error, and was so admitted at a time when he had no particular interest in otherwise defining the character of the instrument, when he and his attorneys were giving their unbiased opinion as to its nature and character and when from their own viewpoint, it was unnecessary to deny the character of the instrument in order to bolster up a failing cause.

On page 19 of the record, speaking of the execution and character of the instrument, in the petition herein it is claimed the defendants in error had Gilcrease "to execute and deliver to them a certain paper writing, purporting to be an oil and gas mining lease upon the terms herein described, for a royalty of one-eighth of the oil mined and saved from said premises, and purported to vest in Grant R. McCullough a one-half interest, in the plaintiff, Thomas Gilcrease, a one-fourth interest, and the defendant H. B. Martin a one-fourth interest. A copy of said lease or contract is attached hereto, marked Exhibit 'D', and made a part hereof."

On page 20 of the record, in speaking of the instrument of February 8, 1911, its character and effect is further described by the plaintiff in error in his petition as follows: "That by the terms of said contract or lease of February 8, 1911, the defendant, Grant R. McCullough, purported to become the owner of one-half of the equipment on said premises, and the defendant H. B. Martin, of one-fourth interest in said equipment on said premises."

Further on page 20 of the record, the instrument of February 8, 1911 is spoken of in the petition as follows: "That upon the execution of the lease of February 8, 1911, hereinbefore referred to as 'Exhibit D,' the defendants procured the plaintiff to execute his note on the First National Bank of Tulsa, Oklahoma," etc.

The instrument of February 8, 1911, is again described in the petition as a lease on page 30 thereof, as follows: "And the pretended lease of Thomas Gilcrease to H. B. Martin and G. R. McCullough, of February 8, 1911." It is thus seen that, in the judgment of plaintiff and his learned counsel, the instrument bearing date of February 8, 1911, after it had been examined by them, for the purpose of attack and having it set aside, was, in their judgment, a lease and sufficient to vest the leasehold estate, and it was not until after the decisions of the Circuit Court of Appeals of the

Eighth Circuit and the Supreme Court of this state settled the fact that Thomas Gilcrease was an adult on February 8, 1911, and as such would have a perfect right to make an oil and gas mining lease on such day, that it ever entered the minds of these distinguished gentlemen to question the fact of the efficacy of the instrument of February 8, 1911, to convey or vest such interest. Then and only then did it dawn on them to assert or claim that the instrument was insufficient to confer or vest a leasehold interest or estate.

It is apparent that the attorneys of Gilcrease were correct in their first estimate and judgment as to the character of the instrument of February 8, 1911, and its sufficiency to vest a leasehold interest or estate, for the lease or the instrument itself confers the right to mine, produce and sell the oil produced from the land described. It bears all the necessary and usual conditions and stipulations contained in an oil and gas mining lease. This instrument is found on page 310 of the record, and among other things contains the following: "That for and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their respective heirs, administrators and assigns, shall have and hold, in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:" (describing the land) "as long as oil and gas, or either of them, are found upon said premises in paying quantities." Then follow the other stipulations as to the terms on which the land described is to be operated for oil and gas, and the quantum of interest each of the parties is to have in the oil when so produced.

The instrument is properly executed and acknowledged, as instruments affecting the title to land were at that time required to be executed and acknowledged, and placed of record for the purpose of giving notice of the interest of the different parties thereto. The instrument bears all the requisites of a valid agreement. On its face it recites that it is made in consideration of the mutual covenants and agreements thereafter contained. One of these agreements and covenants was that Thomas Gilcrease should receive "as royalty from said leased premises," "one-eighth of all the oil mined and saved upon said premises delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil upon the demand of said Thomas Gilcrease." This is the usual royalty clause contained in oil and gas mining leases, and it will be noticed that it is described "as royalty from said leased premises." The contract then provides that in addition to said royalty that Gilcrease, his heirs, executors and assigns, shall have and hold an undivided one-fourth interest of "the leasehold interest in said property"; the said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half of "the leasehold interest in said land," and H. B. Martin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth of "the leasehold interest in said land."

The instrument contains the further stipulation, which is unusual in character in that it imposes a specific burden and gives the lessees

no right to get from under the burdens imposed by the lease, such as are usually contained in oil and gas mining leases. This stipulation is as follows: "And it is further contracted, covenanted and agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date, as long as oil and gas is found in paying quantities. \* \* \*

The instrument also contains a stipulation as follows: "And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casing or any other portion of said equipment from any wells upon said leased premises, as long as oil is produced from said wells in paying quantities. \* \* \*

This instrument, which the parties to it have in it denominated a lease, provided for the immediate operation, and that such operation should continue as long as oil and gas were produced in paying quantities. From this obligation of immediate and continuous development, equipment and operation, the lease furnished no means of escape. This stipulation was a plain assumption of a continuing duty, obligation and liability which could not be avoided by anything contained in the lease, and could not be avoided except by a violation of its terms and rendering the parties thereto liable.

All the instruments, leases and conveyances set out in this record were entered into after the passage of the Act of May 27, 1908, and consequently, under the law as declared by the Supreme Court of this state, each of the instruments stands unaffected by the fact that there may have existed a prior contract or agreement for its execution, entered into while Thomas Gilcrease was under restrictions, and does not fall under the ban of the prohibition contained in the Act of April 26, 1906. In addition to this there is no claim in the evidence that any contract agreement or understanding existed between Gilcrease, Martin and McCullough, or any one else for the execution of the instrument of February 8, 1911, prior to that date, the only claim being that it was executed in pursuance of the alleged confederacy between the defendants to unlawfully acquire a lease upon the land. This would not be sufficient even to bring the agreement under the ban of the Act of April 26, 1906, because, in the very nature of things, Gilcrease was not a party to such alleged secret, confederacy and conspiracy, by which it was sought to despoil him.

The Supreme Court of this state has more than once decided that the Act of May 27, 1908, does not render an agreement or conveyance executed after removal of restrictions void by reason of an agreement so to do made during the period of restrictions, and it has also held that because such an instrument was executed after the removal of restrictions, it does not follow it was executed in pursuance of a previous agreement so to do made when under restrictions.

In *Oates v. Freeman*, 157 Pac. 74, speaking of an instrument executed when the Act of April 26, 1906, was in force, the Supreme Court of this state on rehearing, and after full consideration and elaborate argument, and after the case had been twice presented on petition for rehearing, said:

"The contract or agreement to convey within the inhibition of



this statute, is not to be inferred, as we understand it, from the mere fact of the execution of a deed during the period of restrictions, and placing that deed of record, and the execution of a deed to the same party for the same land, after the restrictions had been removed."

In *Henley v. Davis*, 156 Pac. 337, not yet officially reported, the court say:

"A Creek freedman citizen, who, subsequent to the taking effect of the Act of Congress of May 27, 1908, while a minor, by a deed void under the provisions of said act, attempted to convey her allotted lands, may, upon arriving at majority, convey said lands to the grantee named in her former deed. Such later conveyance made when she is an adult, if regularly and voluntarily executed, and without fraud or duress, is valid and binding upon her."

Further the court say:

"We are of the opinion that the only restraint upon alienation of the lands involved herein are contained in the Act of Congress of May 27, 1908, which is the revising act, and was intended as a substitute for the provisions of all prior laws on the same subjects embraced therein."

In *McKeever v. Carter*, 157 Pac. 56, not yet officially reported, the Supreme Court of this state, speaking of the Act of April 26, 1906, and the Act of May 27, 1908, say:

"By the language of this section a deed made after the removal of restrictions, if made in pursuance of an agreement entered into before the removal of such restrictions, is void. The Act of May 27, 1908, contains no such language, as will be seen from the section quoted, *supra*, but simply enacts that all attempted alienations and contracts to sell entered into before removal of restrictions, are declared void. There is no prohibition against sale, after restrictions are removed."

Thus it will be seen that there is no statutory provision and no rule of statutory construction which renders the instrument of February 8, 1911, void or voidable. It stands, like every other contract, to be judged of by and in accordance with its terms, and the conditions under which it was executed. No rule of law or statute prohibited its execution or rendered it in any manner subject to attack.

The plaintiff in error having failed to establish the existence of the conspiracy or confederacy to cheat and defraud, and the evidence showing no fraud, persuasion, deceit or duress exercised on Thomas Gilcrease to procure the execution of this agreement, it is evident the agreement must stand unless it contains some evidence of self destruction within itself. An examination of the instrument fails to disclose any such element. It is regularly executed and acknowledged, was executed by parties possessing capacity to enter into contracts. It seems, however, to be assailed now on two theories; one that it fails by its terms to confer any interest, and the other that it has no consideration to support it. Neither of such contentions are made in the pleadings. The pleadings describe it as a lease, the parties to it speak of it as a lease, of the passing of the leased premises, and what is to be done with the leased premises. It is not contended in the pleadings that it is without consideration further than it is a part of the entire transaction and must fall because, as it is claimed,



it grew out of the prior illegal transaction, and therefore is devoid of legal consideration. The first contention that it is without power to confer an interest, is too puerile to stand in need of extended argument. It is true it does not contain the words "grant, bargain and sell." These words are never necessary even to convey an interest in real estate or a fee title, if it appears from the instrument it was the intention of the parties to so convey. These words are unnecessary in any oil and gas mining lease. First, because such lease, or rather the instrument usually spoken of as a lease, does not convey an interest in land. So it follows that words of conveyance are unnecessary, and indeed inappropriate in such an instrument. Second, because such instruments are not strictly leases. The instrument does provide that they "shall have and hold \* \* \* the exclusive right to mine oil and gas from and upon the premises hereinafter described." This is all that the instrument usually called an oil and gas mining lease can give and does give—merely the right to mine and dispose of the oil in accordance with the terms of the instrument. This confers the right to enter on the land for the purposes of the instrument with like effect as if the right of entry and the right of possession for such purpose was given in express words. It is sufficient in a deed to the fee of the land that it appears to be the intention of the parties to convey. If this appears a fee title passes even though no apt words of conveyance are used.

In *Horton v. Murden*, 43 S. E. 786, the Supreme Court of Georgia say:

"There must be proper words used in order to convey title to land or to create a lien thereon. In Georgia, where no particular form is required in a deed or mortgage, it is not necessary to use 'grant,' 'bargain' or other technical words; but any language showing an intent to convey or mortgage is sufficient."

In *Pierson v. Armstrong*, 63 Am. Dec., at page 449, the Supreme Court of Iowa say:

"Is it not the intent and tone and spirit of all our laws and institutions and tenure of lands, that the latter may be conveyed by any words which manifest that purpose, and for any consideration we please so that others having legal or equitable claims upon us are not injured?"

In *Harlowe v. Hudgins*, 31 Am. St. Rep. 21, the Supreme Court of Texas say:

"No precise technical words are required to be used in a conveyance of real estate. The use of any words which amount to a present contract of bargain and sale is sufficient. Whatever may be the inaccuracy of expression, or the inaptness of the words used in the instrument, the courts will give effect to it if an intention to pass the title can be discovered therefrom."

Authorities on this proposition might be multiplied practically without limit, but the intention of the parties appears so clearly and unmistakably from the instrument in question that a further discussion of it and citation of authority is unnecessary. Indeed, the words used in this instrument are apt words for its purpose. The words of present conveyances, "grant, sell and convey," would not

be, considering the nature of the paper usually called an oil and gas mining lease, apt words, because under such instrument no interest in the land passes.

The contention that the instrument is without consideration to support it, is altogether without merit. The instrument itself recites that it is made in consideration of the mutual covenants and agreements therein contained. The mutual agreements are that Gilcrease shall have a royalty of one-eighth of the oil produced and saved from the premises. This royalty is to be free, clear and discharged, and is not to be liable to be taken in payment of any of the debts created in the operation of the leased premises. There is a provision without any defeasance, that the leased premises shall be operated for oil and gas as long as they are produced in paying quantities. Each of the parties in interest becomes individually liable for the entire indebtedness created, although provision is made for proportioning the amount between the parties. Yet, to the persons with whom the indebtedness was created, McCullough and Martin would be liable to the entire amount of the indebtedness created, and it could be enforced against them by the creditors. When one reads this instrument, it is impossible to conceive that the same is without consideration. Consideration being present, the question of its adequacy is eliminated in this case for failure to prove duress or fraud, and we are not concerned with that question. The instrument being in writing of and by itself imports a consideration, and puts the burden of proving a want of consideration upon the person attacking it on that ground. At common law no consideration was necessary to support an instrument under seal, or rather, an instrument under seal imported a consideration which precluded an attack. Our statute does not require any instrument to be under seal, but provides that they shall have the same effect as if under seal, and this being so, all written instruments which arise to the dignity of deeds of specialty under common law import a consideration which could not be overcome except for certain provisions of our statute. These provisions are as follows:

Sec. 934, Revised Laws of Oklahoma, 1910, is as follows:

"A written instrument is presumptive evidence of a consideration."

Sec. 935 of the same work is as follows:

"The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

So this instrument stands with the presumption of law created by statute that it was executed on a sufficient consideration and that the party attacking it must show to the contrary. There is no evidence showing want of consideration. Notwithstanding the statutory provisions above set out, it is well established law, and has been so established almost from the beginning of the law, that the mutual covenants, stipulations and agreements in a contract or written instrument constitute sufficient consideration to support it, and it is not for the court to put the value on such mutual stipulations, covenants or agreements. The parties themselves must judge of

this. Otherwise, persons would be deprived of the right to contract and deal with their own as they saw fit.

In 9 Cyc. 323, it is said:

"Where mutual promises are made the one furnishes a sufficient consideration to support an action upon the other."

It is a sufficient consideration that the thing to be done constitutes a benefit to one of the parties or a detriment to the other. It need not have a money value. It is sufficient if it requires him to do something he would not otherwise be legally liable to do or perform.

In Ruling Case Laws, Vol. 6, page 656, Sec. 68, it is said:

"The detriment which will constitute a consideration for a promise need not be an actual loss to the promisee. It is sufficient if he does something he is not legally bound to do. To constitute a consideration it is enough that something is furnished, done, forbore or suffered by the party to whom the promise is made as a consideration for the promise to him."

A multitude of authorities sustaining this could be cited. In the absence of the contract of February 8, 1911, it can not be contended that McCullough and Martin were under any legal obligation to develop and operate the land in question for oil and gas mining purposes, to produce oil therefrom, or to furnish money for such purpose. Indeed it is the contention of the plaintiff that no such liability existed. It therefore follows that they did something, entered into a promise to do something which they were not legally liable to do, something they were not legally bound to do. It has been held that a promise to make an offset, which is compellable only in chancery, in consideration of a promise to pay the interest of the debt, is sufficient to support the agreement. (*Punderson v. Fanning*, 1 Rouse 193.) A promise to contribute to the expense of an enterprise, in consideration of a promise to give a share of the proceeds has been held sufficient consideration to make a binding contract. (*Butenstoff v. Michaels*, 56 N. Y. 607.) A promise that if defendants would hire of plaintiffs two negroes as boat hands, he would deliver to them his cotton crop to carry to market, has been held to be a sufficient consideration to enforce the agreement to deliver the cotton. (*Rice v. Sims*, 8 Rich. 416.)

It has also been held that an offer to pay the expenses of a person to take a trip to Europe for his own pleasure and recreation when accepted, was sufficient to constitute a contract and to render the promisor liable for the expenses of such trip.

Even conceding the assignment to Martin and Gilcrease by McCullough to be good, the instrument of February 8, 1911, would still have consideration enough to support it because prior to its execution Martin and McCullough were under no contractual obligation to develop. Neither would be liable for goods bought by the other for the development of the property. Gilcrease, by the purchase of material necessary, or supposed to be necessary to operate or develop the premises, could have placed no personal liability on Martin or on McCullough. Yet under the instrument of February 8, 1911, there was an absolute undertaking to operate. There would be an absolute individual liability on the part of McCullough and

Martin for every dollar's worth of property that was used in the development, equipment or operation of the premises. It is true that Gilcrease would also be personally liable. But this would not relieve Martin and McCullough of their individual liability. It is true the lease provided for the payment of such expenses out of the oil to be produced, less the royalty interest. This did not relieve Martin and McCullough of their individual liability for the entire indebtedness. It only presented a means by which, if the lease proved productive, they could escape personal liability for that portion of the indebtedness belonging to the other by the application of the proceeds of the oil to be produced to the extinguishment of such indebtedness before any division thereof could be had among the parties to the instrument. If the lease did not produce oil, or if it did not produce oil for a sufficient length of time to liquidate such indebtedness, Martin and McCullough would each be individually liable for the whole amount of the indebtedness that might remain unpaid. Under the contract of February 8, 1911, Martin and McCullough would be compelled to contribute to the expense of operation and development of wells so long as the property produced oil in paying quantities, even though, in their judgment, it might be good business policy to cease operations.

In 6 R. C. L., page 676, Sec. 84, it is said:

"The considerations which have been considered so far have been those which are necessary to support unilateral contracts. For the promise of one of the parties in a bilateral contract, no other consideration is necessary than the promise of the other. It is usually said that where there are mutual promises, one is the consideration for the other. \* \* \* It is the promise, and not the performance thereof, that constitutes the consideration, except where by the terms or necessary intendment of the agreement between the parties, performance on one side is made a condition precedent to performance on the other."

In the present case it appears from the pleading and proof that Martin and McCullough have performed the obligations imposed upon them by the agreement of February 8, 1911. It may be said in the light of subsequent events that the consideration furnished by Martin and McCullough, in view of subsequent returns, was inadequate and insufficient to support the agreement of February 8, 1911. There however can be nothing in this contention. It is admitted that this agreement has proved more valuable to Martin and McCullough than either of them dreamed of at the time of its execution. It likewise proved more profitable to Gilcrease than he dreamed of at the time of the execution of the lead of February 8, 1911. The contract must be judged as of the conditions that presented at the time of its execution. The conditions then presented were, that the land had been formerly leased under a departmental lease; that it had been operated in such manner by the former lessee as to make the question of its value problematical. The production had greatly fallen off. The lessee in possession had said he would extract all the oil from under it, and the manner of his operation was such as to induce skilled oil men to believe that he would do so, and that the lease

would be practically without value, or might be so on the termination of the lease. Under the terms of his lease, the former lessee had the right to remove all improvements from the land and strip the wells of everything except the casing. There were from forty to fifty wells on the lease, some of which had gone dry, others producing so little as to make the question of whether they were producing oil wells one of doubt and the occasion of litigation. It would take from fifty to seventy thousand dollars to equip this lease and put it in condition to produce oil. If it was left idle for any length of time the wells would fill with water and the value of the lease, if not entirely destroyed, greatly impaired, and if left for any time its value would be entirely destroyed. This effect on wells standing open without operation is so well known as to be a matter of general history of which the court will take judicial knowledge. It was uncertain if after the lease was equipped and put in condition to produce oil whether it would do so in such quantities as to ever repay for the outlay. Gilcrease was unknown to the business world, and without credit. The question with him was to be able to put the lease in such condition as it would not be rendered valueless. Under these facts and conditions the reasonableness of the contract of February 8, 1911, must be judged, and as so judged we say it is not unreasonable, and we say that it required an expenditure of from fifty to seventy thousand dollars, and in fact did take sixty-eight thousand dollars to equip it, under conditions which skilled oil men had refused to purchase the entire working interest at \$10,000.00, where the former lessee who was in possession and operating the lease was only willing to pay \$3,000.00 for a new lease. To say that because this venture has proved successful beyond the dreams of the parties thereto, we will now look back after the element of chance has been removed and say the contract is unreasonable, is to levy tribute on success and to penalize industry. Of course no man purchases a lease, expends a large sum of money in its development, without the expectation, without the hope, that the venture will prove paying, and pay sufficiently to compensate for the great risk taken. Martin, McCullough nor Gilcrease would never have become liable or agree to become liable to expend fifty thousand or more dollars necessary to equip this lease without the expectation that the lease would produce enough oil, not only to reimburse them for the expense incurred, but give them a rich margin beyond. Yet the only argument advanced against the consideration of the lease of February 8, 1911, is that it provides for the payment of improvements out of the oil. This provision was of course put in to prevent McCullough and Martin from being personally liable for the entire indebtedness if the venture proved unprofitable, if the lease only produced oil in sufficient quantities to pay for the equipment, or a part thereof. It was put there so those who were financially responsible, especially McCullough, could apply the oil to the discharge of this indebtedness before a division was had. This was agreed to by Gilcrease because he knew if this lease did not prove valuable he was without means and could not pay his proportionate part of the expense. If the lease had only produced \$20,000.00

worth of oil and then quit, McCullough, Martin and Gilcrease would have been liable for the \$48,000.00 expended in excess thereof. Gilcrease not being able to respond for his proportion of \$48,000.00, McCullough and Martin would have had to make the deficit good. If the lease produced only \$20,000.00 worth of oil, and the proceeds of it had been divided among the parties thereto before the payment of the indebtedness on the failure to produce more, Martin and McCullough would have been left to foot the entire \$68,000.00 of indebtedness. But it is unnecessary to enter into this discussion. The agreement to become liable, the agreement to work the lease to exhaustion, formed sufficient consideration for its execution. Courts do not ordinarily go into the question of equality or inequality of consideration, especially where the consideration is not the payment of sums of money, but act upon the presumption that parties capable of contracting are capable of regulating the terms of the contract, granting relief only when inequality is shown to have arisen from mistake, misrepresentation or fraud. A different rule would in every case impose upon the court the necessity of inquiring into and determining the value of the property acquired by the party giving the promise. In all cases, therefore, where the consideration of the assumption or undertaking is founded upon the sale or exchange of merchandise or property, or upon other than a money consideration, and the promise has been deliberately made, the law looks no further than to say that the obligation rests upon a consideration, that it is one recognized as legal and of some value. It is sufficient if it is only of slight value or such that can be of value to the promisor. Where a party contracts for the performance even of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has done him, there is no measure by which the estimate he places thereon can be corrected. There is in such a case no rule by which the courts can be guided if once they depart from the value fixed by the promisor. If, in the classes of cases resting on mutual promises, there is any legal consideration for a promise, it must be sufficient for the one made, and if this is not so the court of necessity substitutes its own judgment for that of the promisor, and in doing this makes a new contract or defeats a contract executed between competent persons, and under which rights, duties and obligations have arisen. This, as we understand it, is the rule established by the authorities in this state. Gilcrease, on February 8, 1911, was of age. He has been shown by the evidence to possess, and was found by the trial court to possess, more than ordinary business judgment, acumen and foresight. He had full legal capacity to do with his land as he saw fit, to give it away entirely if he so pleased, and as no fraud has been established in this case, even for the sake of the argument conceding that the consideration was inadequate, the agreement can not be set aside on that ground.

In *Hope v. Foley*, 157 Pac. 727, in speaking of Indian deeds, it is said:

"From this fact we take it that proof of the payment of a present consideration is not essential to the validity of such conveyance, but



the approval of the approving agency provided in the act renders the conveyance valid, although no consideration was paid or recited in the conveyance. The title to the inherited land was in the heir, and the heir had the right to convey upon approval of the approving agency. We take it that, if he gave the land away, and the proper agency approved the conveyance, the title would pass to the grantee, and the heir could not thereafter repudiate the conveyance."

In *Bruner v. Cobb*, 131 Pac. 165, the court (Okla.) say:

"Whenever it appears that the parties to a trade have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor reason for interference by courts, for owners had a right to sell property for what they pleased."

In *Chandler v. Rowe*, 148 Pac. 1026, the court (Okla.) say:

"In the absence of other evidence of mistake or fraud, inadequacy of consideration is not of itself, ordinarily sufficient ground to justify a court to cancel a deed."

In *Lewis v. Allen*, 142 Pac. 384, the court (Okla.) say:

"Inadequacy of consideration alone is not sufficient to justify a court of equity in setting aside a deed regularly executed."

Further along in its opinion the court say:

"We do not know what weight or influence the moral obligation had as an inducing cause in prompting Mrs. Lewis to enter into the contract for a deed, and in performing this contract, but after the delivery of the deed it then became a legal and binding conveyance and the court below was right in so holding."

The court then goes on and holds that the deed was valid even though made in pursuance of a contract entered into while the grantor was under restrictions, and after citing *Maharry v. Eatman*, 26 Okla. 46, 116 Pac. 935, say:

"We therefore conclude that section 16 of the supplemental agreement was no longer applicable to the class of allottees to which Mrs. Lewis belonged, and that all restrictions against the alienation of the land were removed by the Act of May 27, 1908. She had a perfect right to alienate her allotment on September 26, 1910, as she did in making the conveyance of that date to the defendant in error, Charles R. Allen, and on such terms as she pleased, so long as she was fairly dealt with, as she seems to have been in this instance. The trial court having found that this deed was secured without fraud and for an adequate consideration and decreeing the title to the allotment in the defendant in error, Allen, these findings of conclusion being supported by the evidence, are conclusive on this court."

In *Henley v. Davis*, 156 Pac. 333, the question of the validity of an Indian deed made for the same land for which a prior deed had been made, during restrictions, and the sufficiency of its consideration, was before the court (Okla.), and passing on that question the court say:

"It is further contended that the consideration recited in the deed 'one dollar and other valuable considerations,' is insufficient to support the conveyance of June 10, 1910. The question of fraud on the part of the defendants does not enter into this case. The de-

fendants are in possession under the deed. The rule is well established that a voluntary conveyance of property completely executed, in the absence of fraud or duress, is valid as between the parties."

In another place the court say:

"The only restriction upon the alienation of allotted land of the plaintiff herein imposed or continued in force by the Act of May 27, 1908, was that it rendered her personally powerless to contract with relation thereto while a minor as defined by that act. After she became eighteen years of age as shown by the enrollment records of the Commissioner to the Five Civilized Tribes, that restriction was ipso facto removed, and that act having spent its force so far as her allotment and its future disposition was concerned, became inoperative. The deed of June 2, 1910, is apparently a separate and independent conveyance, voluntarily made by the plaintiff, the execution of which was perhaps prompted by a sense of her moral obligation to the defendant. The land was then hers, free from all restraint upon alienation, and she could part with it to whomsoever she chose, upon any lawful consideration she saw fit to accept, or without consideration."

In *McKeever v. Carter*, 157 Pac. 56, the Supreme Court of this state say:

"Inadequacy of consideration alone is not sufficient to justify a court of equity in setting aside a deed regularly executed."

And the court after reviewing all the then existing decisions of this state on the question of Indians conveying land after they became of age, to the same persons to whom they had been conveyed while under restriction, say:

"In the light of these authorities it would seem that, even though the agreement to convey the land entered into by plaintiff with defendant while plaintiff was a minor was void, and that same could not be enforced had plaintiff declined to perform the same, yet there was no legal impediment in the way of plaintiff conveying his lands to any grantee he chose after reaching his majority, and upon any legal consideration which he saw fit to accept."

Further the court say:

"There is not the slightest evidence in the record tending to impeach the deeds of August 9th and August 31st, other than the fact that an agreement had been made by plaintiff while a minor to convey his lands to defendant. There is no evidence of coercion, undue influence, or other grounds of equitable interference that would impeach either of said two last-named conveyances, and, if plaintiff was on the date of their execution an adult, he was capable in law of conveying said lands to whomsoever he chose, for any lawful consideration, and could, if he saw fit, give said lands away; and, when he executed and delivered these deeds, and accepted the consideration, said deeds were valid and binding conveyances, and operated to transfer plaintiff's title to the grantee therein named, provided he had then reached his majority."

Further along the court say:

"While some of the evidence tends to show the land was worth more than was paid for it, the fact that the consideration paid was

inadequate is not of itself sufficient to render the conveyance void."

In *Hartman v. Butterfield Lumber Company*, 199 U. S. 235, 55 L. ed. 217, there was before the Supreme Court of the United States the question of the validity of a deed executed by a party in pursuance of a void contract, which was prohibited by statute, the deed being made after the prohibition of statute had been removed. In passing on this question the court say:

"For the purposes of this case it may be conceded that the contract made before the patent was, by virtue of the policy of the United States as disclosed in its statutes, void, and could not have been enforced by the Norwood & Butterfield Company, but the contract was not inherently vicious and immoral. It was simply void because in conflict with the federal statutes. \* \* \* When the patent issued, the full legal title passed to the patentee. He could do with the land that which he saw fit, sell or give it away, and if he voluntarily conveyed it he could not thereafter repudiate the conveyance."

In *Pierson v. Armstrong*, cited *supra*, the Iowa court say:

"Saving the rights of creditors and subsequent bona fide purchasers, we enjoy the right to do with it what we please, not merely to sell it, but to give it away. If a deed is without any consideration what matters it between the grantor and grantee and their heirs? Has not the grantee the same right to give away his lot that he has to give away his horse or his watch? Is not the intent and tone and spirit of all our laws and institutions and tenure of lands, that the latter may be conveyed by any words which manifest that purpose, and for any consideration we please, so that others having legal or equitable claims upon us are not injured?"

The Oklahoma authorities above cited establish beyond cavil, make plain beyond question, that on February 8, 1911, Gilcrease, then being of age, in the absence of fraud, could deal with his property, or any rights pertaining thereto, in such manner as he saw fit, could convey it or any interest therein for any consideration he saw fit, or without any consideration whatsoever. This doctrine is that existing in all the states.

When we take into view the facts surrounding the land which was the subject of the agreement of February 8, 1911, the threats that had been made concerning the operation, the decrease in the production, the falling off of the production of wells, the going dry of some of the wells, the large amount of money required to develop and operate the lease, the necessity for instant action, it can not be said with any degree of truth that the consideration for Gilcrease entering into the lease was inadequate. It is, we submit, merely subsequent events, it is that the lease proved productive beyond the dream of any party to the contract, that looking into subsequent facts, that it is contended the consideration was inadequate. Judging by such a test, many contracts could be set aside. There being no fraud in the execution of the instrument of February 8, 1911, it must be upheld against this assault, because, as a matter of both law and morals it is immaterial whether the consideration for its execution was adequate or inadequate, whether it was less or more

than it should have been, whether, in fact it was without any consideration, for it was executed. McCullough and Martin went into possession under it. They have expended large amounts. Under and by virtue of its terms they have become liable for other large amounts if it should be set aside. Even a voluntary conveyance as has been shown by the foregoing authorities, a conveyance without any consideration whatever to support it, will be upheld when it has been executed. The evidence in this case shows that Martin and McCullough went into possession, did develop, that one of them is now in possession and has developed, and further, that they have sold interests or portions of interests held by them in the land, on the assumption of the validity of the contract of February 8, 1911. Under these conditions, in the absence of fraud, even though voluntarily, no court will set such an agreement aside, especially would no court do so which has, in emphatic language, time and time again declared as this court has, that Gilcrease had the right to give the entire interest in the land away without any consideration whatsoever.

All of which is respectfully submitted.

JAMES B. DIGGS,

*Attorney for Defendants in Error.*

RUSH GREENSLADE,

C. C. HERNDON,

*Of Counsel.*

952      Thereafter, at the January, 1917, Term of said Supreme Court, on the 9th day of January, 1917, the following proceeding was had in said cause, to wit:

#5773.

THOMAS GILCREASE

VS.

THOMAS GILCREASE

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause, be, and the same is hereby denied.

953

*Certificate.*

I, Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages numbered from A to E and from 1 to 952, (both inclusive) are a full, true and complete transcript of the record and all proceedings in this court in cause number 5773, Thomas Gilcrease, Plaintiff in error,

versus G. R. McCullough et al., Defendants in error, as the same remain on file and of record in my office.

In Witness whereof, I hereto set my hand, and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 20 day of March, 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,  
*Clerk Supreme Court of Oklahoma,*  
By N. C. ORR, *Ass't.*

954

October Term, 1916.

April 5th, 1917.

No. 1056.

THOMAS GILCREASE, Petitioner,

vs.

G. R. McCULLOUGH et al.

To the Clerk of the Supreme Court of the United States.

SIR: I desire to have printed from the certified transcript of record in the Supreme Court of the State of Oklahoma, only the following pages:

Pages A & B.

Pages 1 to 51, inc.

Pages 87 to 154, inc.

Pages 157 to 202, inc.

Pages 219 to 230, inc.

Page 232.

Page 269, beginning "By the Court," to page 285, inc.

Pages 294 to 324, inc.

On page 362, questions & answers No. 1 and 2.

On page 363, beginning with "cross examination" to question No. 4.

All of page 423.

Pages 550 to 553, inc.

Pages 925 to 949, inc.

The petition for rehearing, exclusive of the title page, and response to petition for rehearing, page 952.

In addition to the foregoing, insert the following stipulations as a part of the current record:

"It is agreed Thomas Gilcrease purchased from H. B. Martin three-fourths ( $\frac{3}{4}$ ) of Martin's one-fourth ( $\frac{1}{4}$ ) interest in the lease at a time when Gilcrease was of age in fact, and was of age under any construction of the enrolment records, and signed division

orders by which pipe lines ran oil from the land, paying to Gilcrease nine-sixteenths (9/16) of the proceeds thereof, and to the other defendants seven-sixteenths (7/16) of the proceeds of the oil produced."

A. J. BIDDISON,  
*Attorney for Petitioner.*

I consent that the foregoing be printed as the record in the above entitled case on certiorari.

FREDK. DE C. FAUST,  
CHARLES F. WILSON,  
JAMES B. DIGGS,  
*Attorney- for Respondent.*



Filed in Supreme Court of Oklahoma, May 31, 1917. William M. Franklin, Clerk.

In the Supreme Court of the United States. October Term, 1916.

No. 1056.

THOMAS GILCREASE, Petitioner,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN, Respondents.

*Stipulation.*

It is hereby stipulated and agreed that the Clerk of the Supreme Court of the State of Oklahoma, shall certify to the United States Supreme Court as the record in the above entitled cause, the printed transcript of the record, printed in said Supreme Court of the United States, October Term 1916, and numbered 1056, Thomas Gilcrease versus G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, and the following as additional evidence contained in the record in this court, and that the said printed transcript of record and the foregoing additional evidence, together with stipulations therein are constituted the record so to be certified by the Supreme Court of the State of Oklahoma, upon and for consideration of this cause in the United States Supreme Court.

A. J. BIDDISON,  
*Attorney for Petitioner.*

JAMES B. DIGGS,  
*Attorney for Respondents.*

On pages 327 and 328 of the record, Mr. Gilcrease testified as follows:

"Q. This lease contract that was made to McCullough bears date of the 24th day of August, 1909. About how long before that, if you recollect, was it that you began to have dealings with any of the defendants in regard to that matter?

A. In regard to this suit?

Q. In regard to that lease or contract?

A. I don't think it was but a few days.

Q. A few days?

A. Yes.

Q. With which of the defendants in the case did you have your first dealings or negotiations?

A. With Mr. Bradshaw.

Q. Is that A. E. Bradshaw?

A. A. E. Bradshaw.

Q. Did you know Mr. Bradshaw at that time?

A. Yes, sir.

\* \* \* \* \*

Q. Did you know Mr. McCullough at that time, along in August 1909?

A. Yes, sir."

On page 383 of the record Mr. Gilcrease testified as follows:

"Q. You didn't consult anybody about whether it was a good price for it before you accepted Mr. Bradshaw's proposition?

A. No, Mr. Bradshaw asked me whether I was not willing to take what he had given for it and I told him yes."

On pages 391 and 392 of the record Mr. Gilcrease testified as follows:

"Q. Well when was it and where that you told the defendant, H. B. Martin, that you had agreed to sell this lease to Mr. Bradshaw for a bonus of \$17,000.00?

A. It was in your office, but I wouldn't be sure as to what date it was, and you told me that it was an awful good trade; that was more than you had been, that anybody had offered you for this lease.

Q. That was more than anybody has ever offered for it I knew of?

A. Yes, sir.

Q. That was more than Milliken had offered for it, that being the offer Milliken made to you and that you had told me about, is that right?

A. Yes, sir.

Q. Did you ask the defendant, H. B. Martin, whether he thought that was a good price for this lease.

A. Yes, sir.

Q. You knew, didn't you, that the defendant H. B. Martin, had never seen this lease?

A. I didn't never know of you seeing it.

Q. You knew that the defendant, Martin, had no experience in the oil business and had no interest in the oil business at that time?

A. I didn't know of any interest that you had.

Q. You had never known of the defendant, H. B. Martin, being concerned in a lease had you up to that time?

A. No. I believe not.

Q. Well, did you ask anybody else whether they thought it was a reasonable bonus?

A. No, sir.

Q. When was it with reference to the time that you came back from Keifer that you spoke to the defendant Martin on that subject?

A. I don't know just when it was.

Q. You had already accepted Bradshaw's offer at that time had you not?

A. He just said you are willing to take what you got then aren't you, and I said yes.

Q. You understood that you had sold it?

A. Yes, sir."

On Page 418 of the record, Mr. Gilcrease testified as follows:

"Q. Just before you brought this suit I believe you say you drew down some money, that you don't remember the amount, from the Texas Company. Did you borrow any money from the First National Bank of which Mr. McCullough is the president, and Mr. Bradshaw is the cashier, immediately before you brought this suit?

A. Yes, sir; just before I brought this suit.

Q. You borrowed that for the purpose of bringing the suit with, didn't you?

A. No, sir.

Q. How much did you borrow?

A. \$5,000.00."

On pages 371 and 372 of the record, Mr. Gilcrease testified as follows:

"Q. Did you consult Judge Hainer in reference to your business matters?

A. I told him what I had there. I told him that I would like to have them attended to if there was anything to be done to them.

Q. Your purpose then was to find out, was it not, whether the titles of the lands upon which you held mortgages were good?

A. There was a lot of interest and things that way that had to be looked after, and I left it there with Judge Hainer to look it up and see if the insurance had been paid.

Q. That is, you, as mortgagee, held the insurance policies on the property upon which you held the mortgages?

A. Yes, sir.

Q. And you wanted to see whether the mortgagor kept the insurance—kept up the insurance and paid the interest—? Did you leave some abstracts there to be examined at that time?

A. Yes, sir."

On page 375 of the record, Mr. Gilcrease testified as follows:

"Q. Now then Mr. Gilcrease, did you and Judge Hainer take up the matter with Mr. Millikin of paying the royalties in which you claimed he had defaulted?

A. Judge Hainer went with me once over to Mr. Millikin, the only time Mr. Hainer and I went over there to see him about these royalties, and so he said he had paid these royalties at that time.

Q. He told you he was not selling any oil did he?

A. Yes, that is what he said. He said he had paid royalty on all oil he had sold and hadn't sold any.

Q. Had you gone to see Mr. Millikin yourself before that time you inquired to see whether he was not paying you any royalties into the Indian Agent's office?

A. Yes, sir."

On pages 386 and 387 of the record Mr. Gilcrease testified as follows:

"Q. Isn't it a fact Mr. Millikin offered you these terms: \$3,500.00 for an extension of the lease as long as oil and gas could be found in paying quantities or \$10,000.00 for the fee, the entire title?

A. That is what he told me the time Mr. Hainer went up to his office——

Q. That is what he told you then?

A. Yes, sir.

Q. That was in July, 1909, was it not, when you and Mr. Hainer went to Mr. Millikin's office.

A. I think it was; yes, sir.

Q. Did he tell you then \$3,500.00 was what this lease was worth?

A. Yes, that is what he told Judge Hainer and myself. \* \* \*

Q. Did he make you an offer of \$10,000.00 for a deed to the royalty and all?

A. Yes, sir."

On page 363 of the record Mr. Gilcrease testified as follows:

"Q. Tom, you are married?

A. Yes, sir.

Q. When were you married?

A. August 19; I believe I was married in August, 1908.

Q. How old are you now according to your computation?

A. I was twenty-three years old on the 8th day of last February.

Q. Have you a family—wife and children?

A. Yes, sir.

Q. You are the president of an oil company?

A. Yes, sir.

Q. You own stock in several oil companies?

A. Yes, sir.

Q. You are extensively interested in the oil business?

A. Yes, sir."

On pages 364 and 365 of the record Mr. Gilcrease testified as follows:

"Q. Did you at any time prior to your coming to Tulsa take any proceedings in court in connection with your father and guardian for the purpose of having him discharged as your guardian?

A. I believe he resigned as guardian, but I forget just when it was, though.

Q. Did you take any proceedings for the purpose of removing your disabilities as a minor and giving you your rights of majority?

A. Yes, sir.

Q. When and where?

A. It seems as though to me it was in September or October, 1908.

Q. That was before you ever came to Tulsa to live?

A. Yes, sir; that was just about two months before I came to Tulsa.

Q. That was sometime after you were married, a month or two?

A. Yes, sir, about a month or so after I was married.

Q. Where was the proceeding taken, in what court?

A. I don't know.

Q. You were there weren't you?

A. It was at Wagoner, yes, sir, it was at Wagoner.

Q. At that time you had a proceeding, a decree entered, there was one entered in the District Court at Wagoner finding you competent to transact your own business and conferring upon you the right to do so \* \* \*

A. I think so, yes, sir."

"Q. You was that was in September or October of 1908, is that right?

A. It is my best recollection of was about that time.

Q. At any rate it was before you ever came to Tulsa to live?

A. Yes, sir.

Q. Before you called upon Judge Hainer at the office of Hainer & Martin, and before you ever met the defendant, H. B. Martin?

A. Yes, sir.

Q. I observe Mr. Gilcrease in your reply on file in this case, which by the way is sworn to by you, this statement: 'but states and shows to the court that the alleged and pretended order made by the said District Court of Wagoner County, was wholly without any jurisdiction in the premises, and that the alleged petition filed in said court was filed by the defendant H. B. Martin, and that plaintiff acted under the domination, control and influence of the said H. B. Martin, and that all this plaintiff did in and about the said matter was done upon the advice and direction of said H. B. Martin, both as to the legal aspects of the matter and as to the same being to the interest and advantage of this defendant,' and some other allegations of similar character. That is not true in point of fact, is it, Mr. Gilcrease, this reference to these rights of majority proceedings you had taken at Wagoner to confer upon you the right of majority?

A. I had never seen you at that time.

Q. You had never met H. B. Martin?

A. No, sir.

Q. And this statement in your reply is entirely untrue in that regard?

A. Yes, sir, I had never met you.

Q. Did you know Mr. Gilcrease at the time you swore to this reply what it contained?

A. I think I knew.

Q. Had you read it?

A. Yes, sir, I had read it."

On page 433 of the record Mr. Gilcrease testified as follows:

"Q. How much of the stock of the Rogan Oil Company were you to receive according to the terms of your settlement with the defendant Martin at the time you made this settlement?

A. Twelve and a half.

Q. Twelve and a half shares?

A. Yes, sir.

Q. The stock at the time stood in the name of the defendant Martin did it?

A. Yes sir.

Q. When did you receive a certificate representing the twelve and a half shares that you took over from Martin at that time?

A. On the 12th day of February, I believe 1911—or 12. 1912.

Q. The day before you brought this suit was it?

A. A couple of days.

Q. Two days before?

A. Yes, sir.

Q. You still hold that stock do you?

A. Yes, sir.

Q. Have you used it to borrow money with as collateral?

A. Yes, sir."

Order appointing Bradshaw guardian, is on pages 478 and 479 of record, and is as follows:

"STATE OF OKLAHOMA,  
County of Tulsa, ss:

In the County Court of said County and State.

In the Matter of the Guardianship of the ESTATE OF THOMAS  
GILCREASE, a Minor.

*Order Appointing Guardian.*

"Now on this 12th day of April, 1910, the above cause comes on regularly to be heard by the court on the petition of A. E. Bradshaw, praying to be appointed as special guardian of the estate of Thomas Gilcrease, a minor. And it appearing to the court that notice of the appointment of said guardian was waived in writing by the relatives and next of kin of said Thomas Gilcrease and all persons interested therein: And it further appearing to the court that the said Thomas Gilcrease is a resident of the City of Tulsa, Tulsa County, State of Oklahoma, and that he is a minor over twenty years of age; And it further appearing to the court that it is necessary that a special guardian be appointed for the purpose of receiving the royalties due the said Thomas Gilcrease from the United States Indian Superintendent at Muskogee, Oklahoma, which royalties approximately amount to \$18,000.00; And it further appearing to the court that the said Thomas Gilcrease has nominated



and requested the appointment of A. E. Bradshaw of Tulsa, Oklahoma, as such special guardian; And it further appearing to the court that the said A. E. Bradshaw is a fit and suitable person to be appointed as such guardian; It is hereby ordered, adjudged and decreed that the said A. E. Bradshaw be and he is hereby appointed as special guardian of the estate of Thomas Gilcrease and for the purpose of receiving royalties and moneys due him from the United States Indian Superintendent as aforesaid. It is further ordered, adjudged and decreed that the letters of guardianship of the estate of the said Thomas Gilcrease be issued to the said A. E. Bradshaw upon his giving bond in the sum of \$20,000.00 to be approved by the court.

N. J. GUBSER,  
*County Judge.*"

On pages 367 and 368 of the record, Mr. Gilcrease testified as follows:

"Q. Do you remember the date of the original deed without consulting the papers that you executed to your mother conveying this land upon the advice of Mr. Butte, who was one of your lawyers at Muskogee?

A. I think it was September 9, 1908.

\* \* \* \* \*

Q. At that time I understand you to say that you were advised by Mr. Butte that this deed should be executed for the purpose of testing the question of whether a married minor could convey his real estate?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. You had consulted Mr. Butte on that at the time, had you? You had talked with him about that?

A. Yes, sir.

\* \* \* \* \*

Q. It was intended either you or your mother should take some proceeding in court under the direction of your counsel, Mr. Butte and his firm, for the purpose of testing whether or not you could make a valid deed; was that your understanding of it?

A. Yes, sir."

On pages 405 and 406 of the record, Mr. Gilcrease testified as follows:

"Q. Had you consulted any of your friends or had any persons come to you suggested that you had better try to cancel McCullough's lease and sell it to someone else, or do something else with it?

A. I don't think anyone told me at that time. Mr. Dawson, he talked to me at one time, but I don't know when that was.

Q. When did Mr. Dawson talk to you?

A. Well, I don't know. Once I was going down home from here, down to my father's. He was on the train and so he came and told me. He talked to me that time and told me, *said*, asked me if he could get that lease back for me, he said it was worth a whole lot. I told him I didn't know anything about what it was worth. He said if he could get it back, he wanted to know, from Mr. McCullough and Mr. Bradshaw, he wanted to know if I would sell it to him for a whole lot more money than I had got. I don't remember just when that was.

Q. Did you tell Mr. Dawson in that conversation, or did Mr. Dawson tell you that the Supreme Court of this state had decided that a married minor could not make a valid deed to his land, that as an allottee, and Indian allottee?

A. I don't know what all he did tell me. He talked to me quite a while.

Q. Did you tell him that you were acquainted with that decision, that you had already read it and had your attention called to it, or in substance what I am now stating, and that you did not want to bring any law suit in regard to it; that you were satisfied with the agreement you had made with Mr. McCullough?

A. I told him at that time that I didn't, that I didn't want to bring any law suit against McCullough and Mr. Bradshaw.

Q. That was immediately before your birthday, in February, 1911, that you had that conversation was it not, Mr. Gilcrease?

A. Well, I couldn't say.

\* \* \* \* \*

Q. That was on the train between here and Muskogee?

A. Yes.

Q. And you deny you told Mr. Dawson you didn't want to bring any law suit, even though you might be able to avoid your contract?

A. I told Mr. Dawson I didn't want to bring any law suit.

Q. Mr. Gilcrease, after the decision of the Supreme Court of Oklahoma on that question of a married minor's title was handed down in 1910, did you read that decision in the office of H. B. Martin?

A. Some one of you asked me that before. I don't remember whether I read that.

Q. You don't remember?

A. No.

Q. Do you remember whether the defendant, Martin, told you about that decision and told you what it decided, and got a copy of it, a typewritten copy, for you to read?

A. No, I believe not.

Q. You don't say that is not a fact do you?

A. No, I wouldn't say. I do not remember anything about whether I read it or not."

On page 407 of the record Mr. Gilcrease testified as follows:

"Q. You referred yesterday to a conversation with Mr. Butte, at Muskogee, on the subject of testing the question whether you, as a

married minor, could deed your allotment. Do you remember that conversation?

A. Yes, sir.

Q. And I think you said Mr. Butte advised you that there was a question, advised you that that was a question that was not yet determined, that he intended to test it in this transaction?

A. Yes, that is what he had me give my mother this deed for.

Q. Now from that time on, with reference to handling your lease, your land, the allotment in question here, did you handle it yourself, or did you go on the theory that you were not in a position to handle it yourself, and that it would have to be handled by your guardian? Which course did you adopt?

A. Well, there never was anything done about it till I gave Mc. McCullough a lease.

Q. Well, you brought suit didn't you, in your own name, for the recovery of past due royalties and for the cancellation of this lease?

A. Yes, sir.

Q. Your guardian, I believe, had resigned or been discharged before that time, had he?

A. Yes, sir.

Q. Your personal estate had all been turned over to you individually?

A. Yes, sir.

Q. You handled it all?

A. Yes, sir."

On pages 413 and 414 of the record, Mr. Gilcrease testified as follows:

Q. When you were making up the accounts for the purpose of making a settlement with the defendant, Martin, did you take his books and make them up from his books?

A. Yes, sir.

Q. Did he have anything to do with it or did you do it alone?

A. No, sir, I done it alone.

Q. The figures that you reached you stated to defendant Martin what they were, and he being busy simply took your word for it and made the settlement on that basis?

A. Yes, sir that is the way we settled.

Q. You had access, after the time that you had a desk in the offices of Hainer & Martin, to all the books and papers in the office did you?

A. Yes, sir, at all times before.

Q. I beg your pardon?

A. I had had for a good long time.

Q. Whenever you wanted to know anything you went and found it out yourself, you would go to the stenographers that looked after the books?

A. If there was anything there I had anything to do with I could always find it out whether you were there or not.

\* \* \* \* \*

Q. You had also access to the safe in the office, did you?

A. Yes, sir.

On pages 383 and 384 of the record, Mr. Gilcrease, testifies as follows:

Q. You didn't consult anybody about whether it was a good price for it before you accepted Mr. Bradshaw's proposition?

A. No. Mr. Bradshaw asked me whether I was not willing to take what he (Milliken) had given for it and I told him yes.

Q. You had read the petition in the case against Milliken in which you alleged that Milliken had taken, in the last three or four years, off this lease something like a million dollars hadn't you, Mr. Gilcrease, a million barrels of oil; I should have said instead of a million dollars?

A. I probably read it, but I didn't remember anything about that portion.

Q. Mr. Gilcrease, you knew that according to the investigation, that had been made by the inspectors from the Indian agent's office to you and Judge Hainer, and by every other source of information you had been able to reach, you knew Mr. Milliken, at that time, owed you some thirty or forty thousand dollars or more for royalties didn't you?

A. The only *was* I knew was just from the reports these people made to you.

Q. And what I told you?

A. Yes, Sir.

Q. H. B. Martin had told you that according to the best information that he had been able to obtain that Milliken had failed, by many thousand dollars, to pay to you your proper royalties accruing from the oil he had taken from that lease? Is that a fact?

A. Yes sir.

[Endorsed:] October Term 1916. No. 1056. In the Supreme Court of United States. Thomas Gilcrease, Petitioner, Plaintiff, vs. G. R. McCullough et al., Defendants. Stipulation. Biddison & Campbell, Tulsa, Oklahoma, Attorneys for petitioner.

In the Supreme Court of the State of Oklahoma.

No. 5773.

THOMAS GILCREASE, Plaintiff in Error,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN, Defendants in Error.

In obedience to the Writ of Certiorari issued by the Supreme Court of the United States on the 26 day of April, 1917, the printed tran-

script of the record in this cause, as printed under the direction of the Clerk of the United States Supreme Court, in the matter of the consideration of the petition for said Writ of Certiorari, together with the stipulation of the respective parties by their respective counsel, filed in this court on the 31 day of May, 1917, and accompanying the said Writ, is hereby certified to the said Supreme Court of the United States as the record of this court and the same are hereto attached.

The said record being true and complete so far as desired by the parties to said action as shown by their *was* stipulation, transmitted herewith.

It being by the said stipulation agreed that the said printed transcript, together with the said stipulation should be certified as the record in said cause for the consideration of the said United States Supreme Court.

Witness the Honorable John F. Sharp, Chief Justice of the Supreme Court of the State of Oklahoma, and Seal of said Court affixed this 8th day of June 1917.

[Seal Supreme Court, State of Oklahoma.]

WM. M. FRANKLIN,  
*Clerk of the Supreme Court of the  
State of Oklahoma.*

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Being informed that there is now pending before you a suit in which Thomas Gilcrease is plaintiff in error, and G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown are defendants in error, No. 5773, which suit was removed into the said Supreme Court by virtue of a writ of error to the District Court of Tulsa County, State of Oklahoma, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of April, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,  
*Clerk of the Supreme Court of the United States.*

[Endorsed:] # 5773. File No. 25,886. Supreme Court of the United States, No. 1056, October Term, 1916. Thomas Gilcrease vs. G. R. McCullough et al. Writ of Certiorari. Filed in Supreme Court of Oklahoma, May 31, 1917. William M. Franklin, Clerk.

[Endorsed:] File No. 25,886. Supreme Court U. S. October Term, 1917. Term No. 466. Thomas Gilcrease, Petitioner, vs. G. R. McCullough et al. Writ of certiorari and return. Filed June 19, 1917.



Supreme Court of the United States  
at Washington

THOMAS M. SWANSON, Petitioner,  
vs.  
J. E. HENNING, J. E. MARTIN, & E. BRADSHAW,  
and J. E. HENNING, Respondents.

WRIT OF HABEAS CORPUS FOR CERTIORARI  
WITH COPY OF PETITION

U. S. DEPARTMENT OF JUSTICE  
BUREAU OF PRISONS

WASHINGTON, D. C.

In the  
**Supreme Court of the United States**  
of America

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No. ———.

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THOMAS GILCREASE,	- - - - -	Petitioner
	va.	
G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN,	- - - - -	Respondents

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**Brief on Petition for Certiorari**

The petitioner, as plaintiff, filed his action in the District Court, Tulsa County, Oklahoma, to recover the land described therein, and to cancel a certain oil and gas lease by him executed on the 24th day of August, 1909, to Grant R. McCullough, and also to cancel a contract between petitioner and respondents, Grant R. McCullough and H. B. Martin, dated February 8, 1911, and intended to ratify the said lease and provided for operations thereunder and for a division of the proceeds thereof.

The grounds of complaint were that McCul-

lough was the President and managing officer of the bank, where he, Gilcrease, did business; Bradshaw was Gilcrease's guardian and Martin was his attorney in litigation involving the determination of a departmental oil and gas lease upon these lands, which were then being operated thereunder, and that these parties by fraud and over-reaching obtained this lease of a value of more than \$300,000.00, for less than a tenth of its value;

And, Gilcrease further alleged in said petition that at the time of the execution of both the original lease of August 24, 1909, and the contract of February 8, 1911, he was a minor, within the meaning of the Act of Congress of May 27, 1908, and was not twenty-one years of age, as his age appeared by the enrollment records in the office of the Commissioner to the Five Civilized Tribes.

The trial court found against petitioner, and on appeal to the Supreme Court, that court first handed down an opinion holding the transactions fraudulent on their face and did not pass upon the Federal question involved,—that is, the question of Gilcrease's minority.

Defendants below, respondents here, filed a petition for re-hearing, which was granted and the court in its opinion handed down on the 10th day of October, 1916, denied petitioner any relief and held that the enrollment records dated "June 9-99" showing petitioner to be nine years of age, were

not conclusive that he was a minor on February 8th, 1911, but holding the original lease void and not susceptible of ratification, but that the contract of February 8th, 1911, was in itself, sufficient as a lease and valid.

Paragraph five of the Syllabus says:

“Assuming that we can take judicial notice that June 9-99 appearing on the lower right hand corner of the enrollment record was the date of plaintiff's enrollment and that he was nine years old on that date, such is only conclusive that on said date he had passed his ninth birthday and had not yet reached his tenth, and does not prove that he was a minor on February 8th, 1911, the date of the lease sought to be set aside on the grounds of minority, which was four months and one day less than twelve years thereafter.”

The records show that petitioner was a Creek Indian of one-eighth blood, enrolled as of June 9th, 1899, as nine years of age, that the lands in controversy were his allotment and as the only question before this court is—the validity of this original lease of August 24, 1909, and operating contract of February 8, 1911, as affected by the evidence of Gilcrease's age under the Act of Congress, we insert here the said lease and the said contract, together with the enrollment record; the lease is as follows:

“Oil and Gas Mining Lease. This Agreement, Made this 24th day of August, 1909, by and between Thomas Gilcrease, party of the first part, and Grant R. McCullough, party of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Seventeen Thousand (\$17,000.00) Dollars, the receipt of which is hereby acknowledged, and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased and does by these presents grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns all the oil and gas in and under that certain tract of land hereinafter described and also all the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa County, State of Oklahoma, and described as follows, to-wit:

‘The south half (1-2) of the northwest quarter (1-4) and the north half (1-2) of the southwest quarter (1-4) of section twenty-two (22), township seventeen (17) north of range twelve (12) east of the Indian Meridian, containing 160 acres.’

The said party of the first part grants the further privilege unto the party of the second part, his heirs, successors and assigns of using sufficient water and gas from the premises necessary to the operations thereon and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time, machinery or fixtures placed on the premises by said party of the second part.

TO HAVE AND TO HOLD the same unto the said party of the second part, his heirs, successors and assigns, for the term of fifteen years and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the time of the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Milliken, and the said term of this lease shall run for fifteen years thereafter and as long thereafter as oil or gas is being produced as aforesaid.

In consideration whereof, the said party of the second part agrees to deliver to the party of the first part, in tanks or pipe lines, the one-eighth (1-8) part of all oil produced and saved from the leased premises. And should gas be found on said premises in paying quantities, said party of the



second part agrees to pay One Hundred (\$100.00) Dollars yearly, for the product of each gas well while the same is being sold off the premises, but the party of the second part shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

All rentals and other payments may be made directly to the party of the first part or may be deposited to his credit at the Bank of Oklahoma in the City of Tulsa.

All the conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

IN WITNESS WHEREOF, We have hereunto set our hands this 24th day of August, 1909.

THOS. GILCREASE,

*Party of the First Part.*

GRANT R. McCULLOUGH,

*Party of the Second Part.*

State of Oklahoma, County of Tulsa, ss.

On this 24th day of August, 1909, before me, A. B. Davis, a Notary Public in and for said County and State, personally appeared Thomas Gilcrease, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same

as his free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal, this 24th day of August, 1909.

(SEAL) A. B. DAVIS, Notary Public.  
My commission expires November 26, 1911.

Filed for record in Tulsa, Oklahoma, August 25, 1909, at 4 o'clock P. M.

(SEAL) H. C. WALKLEY, Register of Deeds.

State of Oklahoma, County of Tulsa, ss.

I, H. C. Walkley, Register of Deeds in and for the County and State above named, do hereby certify that the foregoing is true and correct copy of a like instrument now of record in my office and recorded in Book 70, page 11.

Dated the 19th day of February, 1912.

H. C. WALKLEY, Register of Deeds."

The contract is as follows:

"Contract. This Indenture, made and entered into this 8th day of February, 1911, by and between Thomas Gilcrease, G. R. McCullough and H. B. Martin,

WITNESSETH: That for and in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, G. R. McCullough and

H. B. Martin, their respective heirs, administrators and assigns, shall have and hold, in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:

‘The south one-half (1-2) of the northwest quarter (1-4) and the north one-half (1-2) of the southwest quarter (1-4) of section twenty-two (22), township seventeen (17) north, range twelve (12) east of the Indian Meridian in the County of Tulsa, and State of Oklahoma.’

as long as oil and gas, or either of them, are found upon said premises in paying quantities.

The said Thomas Gilcrease shall receive as royalty for said leased premises, one-eighth (1-8) of all the oil mined and saved upon said premises, delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil, upon demand of the said Thomas Gilcrease. And in addition to said royalty the said Thomas Gilcrease, his heirs, executors and assigns, shall have and hold an undivided one-fourth (1-4) of the leasehold interest in said property; the said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half (1-2) of the leasehold interest in said land; and the said H. B. Martin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth (1-4) of the leasehold interest in said land.

And it is further contracted, covenanted and

agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date as long as oil and gas is found thereon in paying quantities, and that after the payment of the royalty hereinbefore provided for to the said Thomas Gilcrease, that all of the balance of the proceeds of the oil produced from said leased premises, less necessary operating expenses, shall be applied to the payment of the cost of equipment of said lease until such equipment shall have been fully paid for out of said proceeds.

And it is further contracted, covenanted and agreed that the equipment now upon said leased premises, and hereafter to be placed upon said leased premises, shall be and remain the personal property of the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their heirs, executors and assigns, in the proportion of the interests of said parties in said leasehold, as evidenced by this contract.

And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casing, or any other portion of said equipment from any wells upon said leased premises, as long as oil is produced from said wells in paying quantities, but that when such wells shall become exhausted and

no longer produce oil in paying quantities, then such equipment may be removed by said parties hereto, their heirs, administrators and assigns.

And it is further covenanted and contracted that the expense of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest to the said Thomas Gilcrease shall not be liable for any of the expense of the equipment or operation of said lease, and shall be free from any expense whatever.

In Witness Whereof, We have hereunto set our hands this 8th day of February, 1911.

THOMAS GILCREASE  
G. R. McCULLOUGH  
H. B. MARTIN

State of Oklahoma, County of Tulsa, ss.

Before, me, Benjamin C. Connor, a Notary Public in and for said County and State on this 8th day of February, 1911, personally appeared Thomas Gilcrease, G. R. McCullough and H. B. Martin, to me known to be the identical persons who executed the foregoing instrument and acknowledged to me, each for himself, that they executed the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

(SEAL)

BENJAMIN C. CONNOR.

My commission expires March 29, 1911."

The enrollment records are as follows:

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES. CREEK ROLL, CITIZENS BY BLOOD.

No.	Name	Age	Sex	Blood	Card
1505	Gilcrease, Thos.	9	M	1-8	456

This is to certify that I am the officer having custody of the approved roll of Creek Citizens by blood of Creek Nation and that the above and foregoing is a true and correct copy of that portion of said roll appearing at Number 1505, enrolled as of June 9, 1899.

Post office Leonard, Oklahoma.

J. G. WRIGHT,

*Commissioner to the Five Civilized Tribes.*

C. D. DREWS,

*Clerk.*

Muskogee, Oklahoma, April 3, 1913.

Residence, Leonard, Post Office, Ind. Ter.



Creek Nation, Creek Roll, Card No. 456, Field No. 458.

Dawes' Roll No., Name, Relationship to person first named. Tribal enrollment, Year, Town, No. Tribal Enrollment of Parents, Name of Father, Year, Town, Name of Mother, Year, Town.

1. 1504, Gilcrease, Lizzie, 25, F, 1-4, Broken Arrow, H. G. Vowell, Non-citizen, Martha (self) Vowell, Broken Arrow.
2. 1505, Gilcrease, Thomas, Son, 9, M, 1-8, Broken Arrow, Wm. L. Gilcrease, Non-citizen, No. 1.
3. 1506, Gilcrease, Eddie, Son, 7, M, 1-8, Broken Arrow, Wm. L. Gilcrease, Non-citizen, No. 1.
4. 1507, Gilcrease, Ben, Son, 5, M, 1-8, Broken Arrow, Wm. L. Gilcrease, Non-citizen, No. 1.
5. 1508, Gilcrease, Lena, Dau., 3, F, 1-8, Broken Arrow, Wm. L. Gilcrease, Non-citizen, No. 1. June 9, '99.
6. 1509, Gilcrease, Florence, Dau., 1, F, 1-8, Broken Arrow, Wm. L. Gilcrease, Non-citizen, No. 1.  
(131) Nos 1, 2, 3 and 4 admitted by Colbert  
Citizenship Commission, Sept. 1, 1896, (See Creek  
Citizenship Record, No. 1, pages 106 to 111).

No. 5 born subsequent to application to Colbert Commission.

Citizenship Certificate issued June 9th, 1899.

Residence Stonewall, Oklahoma  
 Date May 1913

This is to certify that I am the officer having custody of the records pertaining to the  
 Department of the Interior  
 Commissioner to the Five Civilized Tribes  
 In this office on or after the 1st day of May, 1913, the following is a true and correct copy of  
 the records of the members of the Creek, Cherokee, Chickasaw, Choctaw, and Seminole  
 Tribes of Indians, and the dispositions of the lands of said tribes, and that the same are  
 in the office on or after the 1st day of May, 1913.  
James B. Bingham  
 Date May 1913

APR 3 - 1913  
 MUSKOGEE, OKLAHOMA

Serial	Name	Age	Sex	Blood	Tribal Enrollment		Tribal Enrollment of Parents		Year	Name of Father	Name of Mother	Year
					No.	(Blood)	No.	(Blood)				
1504	William Little	16	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1505	Thomas	9	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1506	Edna	7	F	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1507	Ben	5	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1508	John	3	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1509	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1510	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1511	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1512	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1513	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1514	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1515	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1516	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1517	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911
1518	Stonewall	1	M	1/4	1	1/4	1	1/4	1911	Wm. Little	Wm. Little	1911

This is a copy of the original record of the Creek Nation, and the dispositions of the lands of said tribes, and that the same are in the office on or after the 1st day of May, 1913.  
 No 15 born but subject to application to the Creek Commission

This is a copy of the original record of the Creek Nation, and the dispositions of the lands of said tribes, and that the same are in the office on or after the 1st day of May, 1913.  
 No 15 born but subject to application to the Creek Commission

It is agreed that this may be inserted in petitioner's brief in lieu of page 12, and part of page 13, to and including the words, "Muskogee, Oklahoma, April 3, 1913, C.C.D.", and that it is an actual photographic reproduction of the original records introduced as plaintiff's "Exhibit S" on the trial in the court below.

James B. Bingham  
 Attorney for Petitioner  
James B. Bingham  
 Attorney for Respondent

June 1913

Enrollment of Nos. 1504-1509 incl. hereon approved by the Secretary of the Interior March 13, 1902.

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the lands of said tribes, and that the above and foregoing is a true and correct copy of the enrollment records on file in this office insofar as the same pertains to the enrollment of Thomas Gilcrease, Creek by blood, Roll No. 1505.

J. G. WRIGHT,

*Commissioner to the Five Civilized Tribes.*

Muskogee, Oklahoma, April 3, 1913, C. D. D."

The court after granting the re-hearing to respondents and determining the case, specially allowed your petitioner to file a petition for re-hearing on his own behalf and that petition for rehearing was denied on January 9, 1917, and by that decision, without opinion, the Court affirms its decision of October 10, 1916, and holds these transactions valid.

It is the contention of your petitioner that these

transactions, to-wit, the lease of August 24, 1909, and the contract of February 8, 1911, are void under the Act of Congress of May 27, 1908, which provides:

“Section 2. That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal; Provided; That lessees of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; And provided further, That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

Section 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the commis-

sioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

Section 5. That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.

Section 6. That the persons and property of minor allottees of the Five Civilized Tribes shall except, as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma."

This statute was held by this Court in *Trusket v. Closser*, 236 U. S. 223, to impose a restriction of minority upon the lands of minor Indians of the Five Civilized Tribes and make void any lease, grant or incumbrance of their lands and this proposition was conceded by the Court below, but the question raised is whether or not Gilcrease was a minor within the meaning of the Act.

As above stated, the Act provides that the enrollment records shall be conclusive evidence as to the age and further believes that males are minors when under the age of twenty-one years.

It was unquestionably the purpose of Congress

in enacting this legislation to eliminate the perjury with which our Court abounded on the question of the age of persons desiring to convey their land and to fix a record or rule by which persons might be governed in determining whether or not a person had the right to convey and this proposition has been uniformly recognized by the courts in *Bell v. Cook*, 192 Fed. Rep. 597. Judge Pollock, writing the opinion for the Circuit Court of the Eastern District of Oklahoma, says:

“Congress did not intend to make that which was black white, or the reverse, nor did it undertake to overthrow the multiplication table, neither of these things could it do, nor did it attempt. But what Congress intended to accomplish, and did accomplish, by declaring the enrollment records of Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of such citizen or freedman, was to require resort to the rolls and records as a fixed and definite public record from which alone can be ascertained whether an allottee does, or does not, possess the qualified age or requisite degree of Indian blood to enable him to alienate his lands.”

In *Rice v. Anderson*, 39 Okla. 279, 134 Pac. Rep. 1120, the Supreme Court of Oklahoma said:

“The purpose of the Act of Congress making the enrollment records conclusive evidence of the age of an allottee was to exclude oral evidence as to the question of age, and the conclusive presumption of law is that the allottee



is of the exact age shown by those records and not merely that the age thus shown is the age at nearest birthday."

In *Linam et al v. Beck*, 152 Pac. Rep. 344, (not yet officially reported), the Supreme Court of Oklahoma also said:

"Where an action is brought to remove cloud from and to recover lands allotted to an Indian, predicated upon a conveyance executed by such allottee on Sept. 6, 1911, and the enrollment records of the Five Civilized Tribes introduced in evidence show that the allottee was enrolled as of September 20, 1900, at which time he was ten years of age, September 20, the date of enrollment, would be regarded as his birthday, and hence he was a minor on September 6, 1911."

The same doctrine is announced by that Court in *Campbell v. McSpadden*, 34 Okla. 377, 127 Pac. 854. In *Phillips et al v. Byrd*, 43 Okla. 556, that Court says:

"Such Act is not now was it intended to be a rule of evidence; but the purpose of said Act is to prescribe terms and conditions upon which members of the Five Civilized Tribes of Indians may alienate their land and to prescribe a fixed and uniform rule by which those contracting with such members of said Tribes could determine the exact date minors may reach their majority for the purpose of alienating their land."

A similar rule is recognized in *Newsom v. Langford*, 174 S. W. 1036, (not yet officially re-

ported), where the Court of Civil Appeals of Texas announced the doctrine.

The same doctrine is announced in *Yarbrough v. Spaulding et al*, 31 Okla. 806, 123 Pac. 843.

These were all cases in which just such an enrollment was had as in the case at bar. But in the case at bar, the Court undertakes to make the distinction that the birthday not being shown, that the record does not show how much passed nine years of age petitioner was on the 9th day of June, 1911, and that therefore he might have been twenty-one years of age at any time within the year previous.

It is the purpose of the Act of Congress to make and establish a rule of alienation and to make actual age absolutely immaterial, but age as shown by the records alone is material and the record did not show petitioner to be twenty-one years of age on February 8, 1911.

This Court had held in *Hagler v. Faulkner*, 153 U. S. 109,

That in the absence of such a statute the enrollment records had no probative force and Congress could not and did not attempt to give them probative force as showing age, but only attempted to fix a rule of alienation that those who appeared by the roll to be minors could not alienate their lands.

A record that shows a person to be exactly nine years of age shows his age as conclusively as one that shows his age to be nine years, four months and one day and there can be no presumption that he is older than the record shows or that his actual age fixed in years is different from what the record shows. Where the record shows years only, as it does in nearly all cases, it determines that age to be even years and not years and fractions thereof.

Conclusive evidence as defined by Bouvier is:

“Evidence, which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue.

Evidence upon the production of which the Judge is bound by law to regard some fact as proved and to exclude evidence to contradict it.”

As defined in *Encyclopedia of Evidence*, Vol. 3, page 268:

“Conclusive evidence is that character of evidence which either forbids or dispenses with any ulterior inquiry as to the matter sought to be established by proof.”

In *M. K. & T. Ry. Co. v Simonson*, 64 Kansas 802:

“A statute which declares what shall be taken as conclusive evidence of a fact, is one which, of course, precludes investigation into

the fact and itself determines the matter in advance of all judicial inquiry.”

It is, therefore, apparent that it was the purpose of Congress to enact substantive law and not a rule of evidence and make that evidence, which this Court had held, had no probative force.

Mr. Wigmore, in his valuable work on evidence, Chapter 42, reaches the conclusion that under our constitutional government the legislative department can not make one fact conclusive evidence of another, if the latter fact is one which the legislature has not power to withdraw from judicial investigation and that all acts attempting to make one fact conclusive evidence of another, can only be constitutional as substantive law and are not in fact rules of evidence.

The effect of the Act of Congress, therefore, is to make the enrollment record the guide and index of the power of alienation and to make actual age in all cases entirely immaterial and the enactment is one of substantive law to the effect that the presumption is conclusive, that the allottee is of the exact age shown by the enrollment record.

Judged by this rule, petitioner is shown to be a minor until the 9th day of June, 1911, and his contracts made in August, 1909, and in February, 1911, are absolutely void.

Any other construction of the act again opens the records to limitless perjury and leaves an un-

certainty of a year as to the time when the allottee can convey and makes the confusion that existed before the Act of Congress, worse confounded.

We respectfully submit, therefore, that the confusion that has arisen by reason of the conflicting decisions of the Oklahoma Supreme Court and the unsettled state of the law and the vast interests involved, make it important that this court issue its Writ of Certiorari and determine the meaning of the Act of Congress and fix the standard that Congress attempted to fix and we think did fix, by which all persons may know when a Creek allottee may alienate his land.

Respectfully, ,

A. J. BIDDISON,

*Attorney for Petitioner.*

## APPENDIX

No. ———.

### In the Supreme Court in the United States of America

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THOMAS GILCREASE,	-	-	-	-	-	Petitioner
vs.						
G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW	-	-	-	-	-	Respondents
and AL BROWN,	-	-	-	-	-	

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### Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

To the Honorable Supreme Court of the United States:

Your said Petitioner respectfully alleges and shows to this court: That by his petition filed in the District Court of Tulsa County, Oklahoma, he sought to cancel and set aside a certain oil and gas mining lease by him made on the 24th day of August, 1909, by which he assumed to lease the south half of the northwest quarter and the north half of the southwest quarter of section twenty-two (22), township seventeen (17) north of range twelve (12) east of the Indian Meridian to Grant



R. McCullough for oil and gas mining purposes and also a certain contract dated the 8th day of February, 1911, between Petitioner and the Respondents, Grant R. McCullough and H. B. Martin, intended to ratify the above mentioned lease and provide for operations thereunder and for the division of the proceeds, accounting was also sought.

The facts are that your Petitioner is a Creek Citizen of one-eighth blood, duly enrolled as such and received the above described lands as his allotment.

That the enrollment records of the Commissioner to the Five Civilized Tribes show that Petitioner was enrolled June 9th, 1899, as nine years of age and show nothing further as to his age or the date of his birth. He would therefore not appear by said enrollment records to be 21 years of age until June 9th, 1911, nearly two years after the making of said oil and gas lease and four months after the making of the contract for operations and distribution of proceeds. And your Petitioner therefore appeared by the enrollment records to be a minor at the time of the execution of both said instruments.

This court has held in *Truskett v. Closser*, 236 U. S. 223, that the effect of Act of Congress of May 27th, 1908, 35 Stat. at L. 312, Chap. 199, was

to place a restriction upon the alienation or encumbrance of the title to allotments of minors of the Five Civilized Tribes and to make void an oil and gas lease executed by such minor covering his allotment.

That statute provides among other things that:

“Section 3. That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said Tribes and of no other persons, to determine questions arising under this Act, **AND THE ENROLLMENT RECORDS OF THE COMMISSIONER TO THE FIVE CIVILIZED TRIBES SHALL HEREAFTER BE CONCLUSIVE EVIDENCE AS TO THE AGE OF SAID CITIZEN OR FREEDMAN.**”

In the case at bar the Supreme Court of Oklahoma held that the enrollment record “is only conclusive that on that date (June 9th, 1899,) he (petitioner) had passed his ninth birthday and had not reached his tenth and does not prove he was a minor on February 8th, 1911, the date of the lease sought to be set aside on the ground of minority which was four months and one day less than twelve years thereafter.” (See paragraph 5 of Syllabus).

The Court held the lease of August 24, 1909, absolutely void as in violation of the Statute above referred to, but held the contract of February 8th, 1911, sufficient not as a ratification, but as a lease,

though it contained no operative words as such, and that it did not violate the restriction of said Act.

Your petitioner therefore says that there was in said cause by his petition and his brief and by his petition for rehearing a title, right, privilege and immunity set up and specially claimed under the said Act of Congress of May 27th, 1908, which provided:

“That any attempted alienation or encumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void.”

And, which Act further provides as above stated that the enrollment records shall be conclusive evidence of the age of any citizen and as held by this Court imposes a restriction upon the lands of minors defined by the Act to be males under the age of twenty-one years. And the decision of the said Court was and is against said title, right, privilege and immunity so especially set up and claimed and is erroneous in the following particulars, to-wit:

First: The said court refuses to be concluded by that evidence which said Act makes conclusive

and said decision is to the effect that actual age and not age as shown by the enrollment records is the material inquiry in determining when restrictions are removed from a minor allottee's land.

Second: The court erred in holding in substance that the Act of Congress made actual age a material inquiry in determining questions arising under the Act so that the enrollment records are conclusive only as to *years* of age and not conclusive as to the question arising under the Act. "When could Petitioner lease his allotment?"

Third: The court erred in not holding that the term "conclusive evidence" as used in the Act means that class of evidence which when produced precludes judicial inquiry into actual age and makes immaterial any question save "what age do the enrollment records show the allottee to be?"

Fourth: The court erred in holding that the enrollment record was conclusive only as showing that Petitioner passed his ninth birthday and not conclusive that he was of the exact age shown thereby.

Fifth: The court erred in holding that the contract of February 8th, 1911, was a sufficient oil and gas lease and was not void as having been given when the enrollment records showed petitioner to be a minor.

Sixth: The court erred in holding the enroll-

ment record dated June 9th, 1899, showing Petitioner to be nine years old at that time was insufficient to show and was not conclusive that he was a minor for the purpose of all questions arising under the Act on February 8th, 1911.

The final decision of said cause was had in the Supreme Court of the State of Oklahoma on the 9th day of January, 1917, at which time said court denied your Petitioner's petition for rehearing in said cause and the complete record of said cause is now in said court where it is numbered 5773 and styled with this petitioner as plaintiff in error and respondents as defendants in error.

Your Petitioner further shows that the title to an immense acreage of land allotted to minors of the Five Civilized Tribes is dependent upon the question here involved. That the said Supreme Court of Oklahoma by its decision in *Linam v. Beck*, 152 Pac. Rep. 344 (not yet officially reported) had held an exactly contrary doctrine and the United States Court for the Eastern District of Oklahoma in *Bell v. Cook*, 192 Fed. 597, had held a contrary rule.

The cause, therefore, is of public importance and the property involved in this litigation is of the value of more than half a million dollars.

Your Petitioner presents herewith as part of this petition a brief presenting more fully his

views upon the questions herein and also a certified transcript of the record in the said Supreme Court of Oklahoma.

WHEREFORE, premises considered, Petitioner prays this Honorable Court to grant its Writ of Certiorari directed to said Supreme Court of the State of Oklahoma, requiring that the record of said cause in said Court and its judgment and decree therein be certified to this Court and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse said judgment and decree and remand said cause and give your Petitioner such other and further relief as the nature of the cause may require and this Court may find appropriate.

THOMAS GILCREASE,  
*Petitioner.*

By A. J. BIDDISON,  
*His Attorney.*

State of Oklahoma, Tulsa County, ss.

A. J. Biddison of lawful age being duly sworn on his oath says: That he is one of the attorneys for Thomas Gilcrease, Petitioner herein, and as such had personal charge of the cause in the foregoing petition mentioned in the Supreme Court of the State of Oklahoma, that he has read the fore-



going petition and that the allegations thereof are true as he is informed and verily believes.

A. J. BIDDISON.

Subscribed and sworn to before me this 29th day of March, 1917.

F. CLEO HOOVER,  
Notary Public.

My commission expires May 15, 1918.

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1916.**

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**No. 1056.**

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**THOMAS GILCREASE, PETITIONER,**

*vs.*

**G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW,  
AND A. L. BROWN, RESPONDENTS.**

---

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
CERTIORARI.**

---

Comes now G. R. McCullough, H. B. Martin, A. E. Bradshaw, and A. L. Brown, respondents in the above-entitled cause, and for their response to the petition for a writ of certiorari filed herein say that said writ should not be issued, on the following grounds and for the following reasons, to wit:

First. The record submitted in said cause shows that there is no Federal question involved in this application decided adversely to the petitioner, Thomas Gilcrease.

Second. The record submitted in support of said petition shows there was not drawn in question in the court below, or

in the opinion rendered by it, the validity of a treaty or statute of or an authority exercised under the United States, nor was there drawn in question the validity of a statute of or an authority exercised under any State, on the ground of the same being repugnant to the Constitution, treaties or laws of the United States, nor was there drawn in question any right, title, privilege or immunity under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States, nor was there any decision either for or against the same rendered.

Third. The record submitted in support of the petition for certiorari shows the sole question decided adversely to the petitioner, Thomas Gilcrease, which has any bearing on any treaty, statute or law of the United States, or any right, privilege or immunity claimed by reason of any such Constitution, law, statute or treaty of the United States, was one of fact, namely, whether Thomas Gilcrease was a minor on the 8th day of February, 1911, as minors are defined in the act of Congress of May 27, 1908.

Fourth. The record submitted in support of the petition for certiorari shows that the petition of Thomas Gilcrease was not denied any right, title, privilege or immunity, set up or claimed under the Constitution, treaty, statute, commission or authority of the United States, but the question decided against him was a question of fact, namely, that the evidence introduced in support of his claim of minority on February 8, 1911, as minority is defined in the act of Congress of May 27, 1908, did not establish the fact of minority on said day, and that the certified copy of the enrolment record introduced in evidence to establish the fact of such minority did not show that Thomas Gilcrease was a minor on such date.

The respondents further say that this cause was commenced in the District Court of Tulsa County, Oklahoma, by a petition, in which Thomas Gilcrease, in short, set up that at the time of the execution of the various instruments set out and described therein he was a minor as minority is defined in the

act of Congress of May 27, 1908; that the contracts set out were made in reference to lands allotted him as a citizen of the Creek Tribe or Nation of Indians, and that all of said conveyances had been procured by fraud. The trial court found against Thomas Gilcrease on the issue of fraud and held that if he was a minor at the time of the execution of the various contracts set out in his petition in the cause he could ratify said contracts after becoming of age, under the act of May 27, 1908, and that after so becoming of age he had ratified the contracts, and judgment was rendered against Thomas Gilcrease.

On the rendition of the judgment against him by the trial court, Thomas Gilcrease appealed the cause to the Supreme Court of Oklahoma, which court found that there was no evidence showing fraud, and holding that the oil and gas mining lease dated August 24, 1909, being executed when Thomas Gilcrease was admittedly a minor in fact, would be void by reason of the act of May 27, 1908, and holding that the certified copy of what is known as the roll card proved the degree of blood of Thomas Gilcrease, but did not prove the date that he was enrolled, and that the certificate of the certifying officer as to the date of enrollment was incompetent to prove such date, and holding that that contract of February 8, 1911, was made when Thomas Gilcrease was in fact twenty-one years of age, and that the certified copy of the enrollment record introduced for the purpose of establishing that he was a minor under the act of May 27, 1908, did not establish the fact of such minority on account of failing to show when he was nine years of age, or the date of his enrollment.

It is one of the admitted facts in the record that Thomas Gilcrease was twenty-one years of age on February 8, 1911, and consequently had the same right to deal with his property the same as any other citizen of the State of Oklahoma, unless prevented from so doing by some restraint placed on him by the laws of the United States. Thomas Gilcrease is a

Creek Indian of one-eighth degree of blood, and consequently falls within the provisions of section 1 of the act of May 27, 1908, which, in so far as it is material to this question, is as follows:

"That from and after sixty days from the date of this act the status of lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or encumbrance, be as follows: All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen and as mixed-blood Indians having less than one-half Indian blood, including minors, shall be free from all restrictions \* \* \*."

It is therefore evident that this provision of law relieves all restrictions against Indians, including minors of the class to which Gilcrease belongs, and he would have full power and authority to deal with his lands as any other citizen of Oklahoma of the same years and discretion would have, unless restrained from so doing by some further provision of the act. It is claimed that such restraint is imposed on him notwithstanding that section 1 provides that all lands belonging to the class of which Gilcrease is one, "shall be free from all restrictions" by the following provisions of the act. The second proviso of section 2 is claimed, in connection with other provisions of the act, to have the effect of imposing restraints on the land. Such proviso is as follows:

"That the jurisdiction of the probate courts of the State of Oklahoma, over lands of minors and incompetents, shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years."

That part of section 3, which is contended should be taken in connection with the portion of section 2 above quoted, and a portion of section 6, to be hereafter quoted, replaced restrictions on land, and is as follows:

"That the rolls of citizenship of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior, shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribe, and of no other person, to determine questions arising under this act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

The portion of section 6 relied on is as follows:

"That the persons and property of minor allottees of the Five Civilized Tribes, shall, except as otherwise specifically provided by law, be subject to the jurisdiction of probate courts of the State of Oklahoma. \* \* \* Provided that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law by order of the court, or otherwise."

Conceding for the purpose of this argument, and for such purpose alone, that the act of May 27, 1908, after declaring in express terms that it removes all restrictions from all lands of Indians of the class to which Gilcrease belongs, and re-imposes a restriction on the land which in effect declares the land incapable of sale during minority, except by an order of the court, and consequently it was not the purpose of the act merely to define the period of minority and confer on the Indian, during such period, the benefits, burdens, and privileges belonging to minority, it is evident that the petitioner, Thomas Gilcrease, could not be denied any right, title, privilege, immunity, or authority under such act, unless the enrollment records, which are made "conclusive evidence as to the age of said citizens or freedmen," do in fact disclose his age, and that according to the age so disclosed Gilcrease would have been a minor on February 8, 1911, as otherwise he would not bring himself within the terms of the act.

The certified copy of the enrollment records introduced in evidence wholly failed to show that Gilcrease was a minor on February 8, 1911, but did show that at some time not



named Gilcrease was nine years of age, and an exact reproduction of such record, together with the certificate of the officer certifying the same, which was introduced on the trial of the cause in the trial court, and made a part of the record for appeal to the Supreme Court, is here submitted for the convenient inspection of this court. It is contended that the words and figures "June 9/99," in the lower right-hand corner of the record, means that that is the day on which the petitioner, Thomas Gilcrease, was enrolled, and that the figure "9," in the column headed "age," shows that he was nine years of age on June 9, 1899, that being the date of enrollment. No evidence was introduced on the trial explaining the card or telling what the date in the lower right-hand corner meant, whether it was date of enrollment or date on which copy of the record known as census card was issued.

It is true that the certificate of the officer certifying the roll card states that Thomas Gilcrease was enrolled as of June 9, 1899. The roll card, under the express language of the act, is not the enrollment record, and such card, like the enrollment record offered, does not show the date of enrollment, and the Supreme Court very properly held in this cause that such roll card was not evidence as to date of enrollment, and that the certificate could not supply such defect, as the office of the certificate was merely to certify to the correctness of the record, and not to any fact not shown by the record so certified. The Supreme Court, in Jackson *et al. vs. McGilbray*, 148 Pac., 703, not yet officially reported, passes on this identical question, and has been followed in every subsequent decision in the State, and is now the established law of Oklahoma, and unquestionably states the true rule of law, and should not be disturbed at this time, even if the doctrine therein announced was doubtful.

The petitioner contends that the enrollment record above mentioned shows Thomas Gilcrease would not be of age, under the act of May 27, 1908, until June 9, 1911. We confess we are unable to say that the enrollment record so shows or to appreciate the force of such reason. The act of

May 27, 1908, makes the enrollment records the exclusive evidence, and we assert it is impossible to determine when Gilcrease became of age from such records. It is the enrollment record that Congress makes the exclusive evidence of age, not records aided by assumption and resting on supposition, but actually existing records. It is impossible for any person to examine the reproduction of the enrollment records herewith submitted and determine therefrom the age of Thomas Gilcrease. It is contended, or rather assumed, by petitioner that the words in the lower right-hand corner of the record, "June 9/99," mean that June 9th is to be taken as the day on which Thomas Gilcrease became nine years of age, or from which such age should be reckoned. It is evident such a conclusion cannot be arrived at from the face of the record itself, and it is only by supposing something that the record does not disclose that such a conclusion can be considered well founded. Congress has made the enrollment records as they exist the conclusive evidence of age, not some supposititious record, not some record aided and abetted by what this court or someone else might determine should be read into the record, or what the record was intended to, but does not in fact, disclose. Congress enacted that on the production of the enrollment records showing the age, such age so shown should be conclusive, and the matter of age put at rest thereby. It did not mean if, in a particular case, the record failed to disclose the age, fiction, construction, and suppositions should be resorted to in order to eke out a deficient record for the supposed purpose of giving effect to the act of Congress. Why we should assume that the words and figures "June 9/99," in the lower right-hand corner of the record, mean that Thomas Gilcrease was enrolled on that day is not apparent. It is suggested, however, we must so hold in order to give effect to the act of Congress. How so holding would effectuate the purpose of Congress we are at a loss to determine. It seems to us it would be directly contrary to the congressional intention, for Congress has made the existing records conclusive evidence. We would be making

a supposititious record, and then saying the record thus made is the record meant by Congress, if we should adopt such reasoning. It may be that the enrollment records fail to disclose in a particular case the age of a particular Indian, and thus the intention of Congress in making the enrollment record conclusive evidence would fail in that particular instance. If such record does not show the age of an Indian, the purpose of the act of Congress in making such enrollment records conclusive evidence as to such Indian fails, because the facts supposed by Congress to exist do not exist. That does not, however, call upon courts to manufacture, by reasoning, a record, and then apply the act of Congress to the record so manufactured.

The ruling of the Supreme Court of Oklahoma in this cause, in reference to the enrollment records not disclosing the age of an Indian allottee, was the law of Oklahoma prior to the decision in this cause, and this decision merely followed the law already established in the jurisdiction. The law as so established has since been followed, and is being followed every day, and should not be disturbed, unless it is impossible to reconcile such holding with the express provisions of the act. The rule has been recognized and followed in the following cases not yet officially reported:

*Jackson vs. Lair*, 150 Pac., 162.

*Heffner vs. Harmon*, 159 Pac., 651.

*Hart vs. West*, 161 Pac., 534.

*Jordan vs. Jordan*, 162 Pac., 758.

The rule of the State court set out in the above cases is also the rule of the Federal courts, and such courts arrive at the same conclusion even where it was admitted that the date in the lower right-hand corner of such record was the date of enrollment. This has been the conclusion of the Circuit Court of Appeals of the Eighth Circuit in two cases: *McDaniel et al. vs. Holland*, 230 Fed., 945; *Etchen vs. Cheney*, 235 Fed., 104. This rule of law, sustained and upheld by the

Supreme Court and the Circuit Court of Appeals, should not be overturned except in the interest of the general public welfare, or unless it is so clearly wrong that it should not be permitted to stand.

The instrument dated February 8, 1911, is clearly a sufficient lease, and whether this be so or not is purely a question of State law involving no Federal question, and whether the same is supported by a consideration is a question of fact, which involves no right, privilege or immunity which petitioner is denied under the laws of the United States. The fact that an Indian minor might have made a contract in reference to his lands while a minor, which we all assume to be void under the statute of May 27, 1908, is no reason why he can not make a new contract in reference to the same lands to the same parties when he becomes of age. This is a well-established law in Oklahoma by a line of well-considered cases, among which are the following:

- Oates *vs.* Freedman, 157 Pac., 74.
- Henley *vs.* Davis, 156 Pac., 337.
- McKeever *vs.* Carter, 157 Pac., 56.
- Hope *vs.* Foley, 157 Pac., 727.
- Bruner *vs.* Cobb, 131 Pac., 165.
- Chandler *vs.* Rowe, 148 Pac., 1026.
- Lewis *vs.* Allen, 142 Pac., 384.

The record submitted in this cause shows that Gilcrease, after June 9, 1911, the date he claims that he was of age by the records, and only a short time before the filing of this cause in the trial court, ratified, confirmed, and adopted the transaction set out in his petition in the trial court, by buying back from a portion of the defendants in the cause an interest in the land, and signing and executing division orders for his proportion of the oil under his contract, and permitting the payment of the portions the defendants would be entitled to under his

contract to them. This he had a right to do, and by so doing ratified and confirmed the transactions complained of.

*Hartman vs. Butterfield Lumber Co.*, 199 U. S., 235.

*Capps vs. Hensley*, 23 Okl., 311.

*Clough et al. vs. Clough*, 33 Me., 487.

It is contended that the act of May 27, 1908, imposes a restriction on the land of Indian minors of less than half-blood. We submit that such a contention is not sound and the claim that it is upheld by the decision of this court in *Truskett vs. Closser*, 236 U. S., 223, is not warranted. The Circuit Court of Appeals in that case held that no law of the State seeking to confer on an Indian during the period of minority prescribed by the act the privilege and powers of majority, could in fact give such privilege, and therefore held that a State law permitting the removal of disabilities of minority and giving a minor the right to deal with his land with the same effect as a person who has reached his majority, did not apply to Indian minors during the period of minority prescribed by the act of Congress, and to so hold would be to make the statute void. On appeal this court affirmed the decision of the lower court, on the ground that the act of Congress was the dominant law, and that no State statute could interfere therewith.

As the enrollment records introduced in evidence, as shown by the record, do not give either the date of enrollment or the date on which petitioner, Thomas Gilcrease, became nine years of age, the Supreme Court of Oklahoma was correct in holding that the record did not show that Thomas Gilcrease was a minor under the act of May 27, 1908, on the 8th day of February, 1911, but as he was admittedly of age in fact on that day it properly gave his contracts effect, and such holding is not a construction of the act of Congress of May 27, 1908, or a denial of any right or privilege thereunder, but merely shows that Thomas Gilcrease did not bring himself within the purview of the act, and hence there was no necessity of

its construction. Therefore, what the court says in reference to the enrollment records when they do show the date of application for enrollment, in regard to such records in such condition not showing the exact age, is, as far as the case now under consideration is concerned, dicta, and if error, the petitioner, Thomas Gilcrease, has not been prejudiced thereby, because the opinion and the judgment of the Supreme Court must have been the same as that complained of, no matter what its conclusion may have been as to the effect of the enrollment records disclosing the date of application, and its following the Circuit Court of Appeals in this regard is without influence on the result reached. Such result must have been the same, regardless of the conclusion as to the effect of the enrollment records disclosing the date of application.

We insist that an inspection of the record shows that the Supreme Court of Oklahoma did not render any opinion in this case which adversely affected any right, title, privilege, immunity, interest or estate of Thomas Gilcrease, the petitioner herein, founded on or growing out of the Constitution or any law, treaty, statute or authority of the United States, and that the petition should be denied.

JAMES B. DIGGS,  
FREDERICK DE C. FAUST,  
CHARLES F. WILSON,  
*Attorneys for Respondents.*





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In the  
Supreme Court of the United States  
of America

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THOMAS GILCREASE, - - <i>Petitioner,</i>	}	25886.
vs.		
G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN,		
- - - - - <i>Respondents.</i>		

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**BRIEF OF PETITIONER**

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**Statement of Case**

Thomas Gilcrease was a citizen of the Creek Nation of Indians, of less than one-half Indian blood. He received as his allotment of the lands of the Creek Nation, the south half of the northwest quarter, and the north half of the southwest quarter of section twenty-two (22), township seventeen (17) north, range twelve (12) east of the Indian meridian, comprising 160 acres of land in the Creek Nation.

The enrollment records of the Creek Nation show him to have been enrolled on the 9th day of June, 1899, of the age of nine years. That would



have made him 21 years of age on the 9th day of June, 1911.

His guardian made an oil and gas lease on this land, which was approved by the courts, and the Department of the Interior, to one W. H. Millikin, in the year of 1906, the lease to expire on the 8th day of February, 1911. On the 24th day of August, 1909, and in the month of February, 1911, Millikin had drilled forty-two (42) oil wells on this land, which were producing oil and, as Millikin's lease expired February 8, 1911, he had to leave those wells and all casing in them to Gilcrease, the petitioner.

On the 24th day of August, 1909, the petitioner, Gilcrease, in consideration of Seventeen Thousand Dollars (\$17,000.00), of which only Four Thousand Dollars (\$4,000.00) was paid, executed a lease on this land to defendant G. R. McCullough, having been induced to do so by defendant H. B. Martin, petitioner's attorney.

Later, McCullough reassigned a one-fourth ( $\frac{1}{4}$ ) interest in the lease to petitioner, in consideration of Fifteen Thousand Dollars (\$15,000.00), and one-fourth ( $\frac{1}{4}$ ) interest to defendant, H. B. Martin, and one-fourth ( $\frac{1}{4}$ ) interest to defendant, A. E. Bradshaw. Bradshaw paid nothing for his interest and while Martin claims to have paid for his, it is doubtful if he ever paid any consideration at all.

There is evidence in the record that Gilcrease arrived at the actual age of 21 years February 8, 1911, and on that date there was a contract executed by him to defendants McCullough and Martin, stating the interest each held in the lease and giving McCullough and Martin an interest in the casing, equipment and other property on the land, in proportion to the interest claimed by them in the lease. After Gilcrease became of age and became informed that he had been swindled, he brought suit in the District Court of Tulsa County, Oklahoma, to cancel the lease made in August, 1909, and the contract made on February 8, 1911, and acquire title to his land and for an accounting.

We think as clear a statement as we can make of detailed facts is the petition filed by Gilcrease, which is as follows:

*State of Oklahoma, Tulsa County, ss. In the District Court: Thomas Gilcrease, Plaintiff, v. G. R. McCullough, H. B. Martin, A. E. Bradshaw, and Al Brown, Defendants.*

### **Petition**

Comes the plaintiff, Thomas Gilcrease, and complains of the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, and for his cause of action states:

That the plaintiff is a citizen by blood of the Creek or Muskogee Nation or Tribe of Indians,

having been enrolled on the tribal rolls of said nation made by the Dawes Commission to the Five Civilized Tribes, June 9, 1899, as of the age of nine years, and of one-eighth degree of Indian blood, opposite Roll Number 1505.

That as such citizen and member of the Creek Nation or Tribe of Indians said plaintiff was entitled, under agreement between the United States of America and the Creek or Muskogee Nation of Indians, embraced in the Act of Congress, approved March 1, 1901, and ratified by the Creek Nation May 25th, 1901, and the Supplemental Agreement between the United States of America, approved June 30th, 1902, ratified by the Creek Nation July 26th, 1902, and proclaimed by the President August 8, 1902, to an allotment of land out of the lands of said Creek Nation, consisting of One Hundred and Twenty acres of Surplus and forty acres of Homestead, and there was duly selected as the surplus allotment of said plaintiff out of the lands belonging to said nation, the following described premises, to-wit:

South one-half of the northwest quarter, and the northeast quarter of the southwest quarter of Section Twenty-two, Township Seventeen north, of Range Twelve east,

and a patent for said land was duly executed by the Principal Chief of the Creek Nation as provided by law under date of August 25th, 1902, and duly

approved by the Secretary of the Interior of the United States of America, December 15, 1902, and duly recorded in the records of the Commission to the Five Civilized Tribes at Muskogee in Record Book 2, at Page 35, and after having been thus duly executed, approved and recorded, was delivered to this plaintiff, and this plaintiff thereby became vested with an absolute title in and to the land mentioned and described therein, and there was selected as the homestead allotment of said plaintiff out of the lands belonging to said Nation, the following described premises, to-wit:

The northwest quarter of the southwest quarter of Section Twenty-two, Township 17 north of Range Twelve east,

and that said surplus and homestead contain together one hundred and sixty acres, and all lie and are situated in the County of Tulsa, and State of Oklahoma.

That the defendants, G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown are all citizens of the State of Oklahoma, and residents of the City of Tulsa, and County of Tulsa in said State.

That the defendant, G. R. McCullough, is now President of the First National Bank of Tulsa, Oklahoma, and A. E. Bradshaw is now Cashier of the First National Bank of Tulsa, Oklahoma, and that Al Brown is an officer and employee of said First National Bank, but in exactly what capacity

he is employed in said bank this plaintiff has no information and is unable to make exact with any more definiteness than above stated. That prior to his acquisition of his interest in the First National Bank of Tulsa, Oklahoma, G. R. McCullough had been a stockholder and officer in the Bank of Oklahoma, and that A. E. Bradshaw was also a stockholder in and an officer of said Bank of Oklahoma, of Tulsa, Oklahoma, and said McCullough and said Bradshaw acquired large interests in the First National Bank of Tulsa, Oklahoma, and affected a consolidation of the business of the Bank of Oklahoma with the First National Bank of Tulsa, Oklahoma, and said Bank of Oklahoma became merged in said First National Bank of Tulsa, Oklahoma. That the defendant, Al Brown, is now, and has for several years last past been a business associate of said McCullough and Bradshaw. That the defendant, H. B. Martin, is an attorney at law, and has been practicing law in the City of Tulsa, State of Oklahoma, for about four years last passed, and was an attorney for the Bank of Oklahoma prior to its merging with said First National Bank of Tulsa, Oklahoma, and subsequent to the consolidation of said Banks has been an attorney for the First National Bank of Tulsa, Oklahoma.

That prior to the consolidation of the Bank of Oklahoma with the First National Bank of Tulsa, Oklahoma, said Bank of Oklahoma had nationalized and become the Oklahoma National Bank of Tulsa,

Oklahoma, and that the consolidation of said Bank of Oklahoma which had become the Oklahoma National Bank with the First National Bank of Tulsa, Oklahoma, was effectuated during the summer or early fall of the year 1911, the precise date of said consolidation this plaintiff is unable to state.

That during all of the period covered by the transactions hereinafter complained of, all the defendants have been business associates and connected with one another in various business relations.

That the land of the plaintiff hereinbefore described is situated in the oil field which is commonly known as Glen Pool, and is underlaid with a large and valuable deposit of petroleum.

That in the month of September, 1906, after the opening of the Glen Pool field, the plaintiff herein, by and through his father and guardian, William L. Gilcrease, entered into a departmental oil and gas mining lease with one W. H. Millikin, embracing the lands hereinbefore described, and said Millikin proceeded to develop same for oil and to drill upon said land between the fall of the year 1906 and the summer of 1909, in all forty-nine wells upon said lands.

That in August of 1909, forty-two of said wells were producing wells, and there was being produced from said land more than twenty-five thousand barrels of oil per month.



That this plaintiff was then a minor, inexperienced in all business affairs, and without any knowledge of the real value of the property involved in this controversy.

That the defendants herein were all men of mature judgment, wide business experience, and extensive knowledge of the conditions existing in the Glen Pool field, and of extensive and accurate knowledge of oil properties situated in said field, and well knew the conditions and value of the particular property involved in this controversy, and were all acquainted with its enormous value as an oil property.

That all of said defendants were well acquainted with this plaintiff and with his situation; with his want of age and experience, and knew that he had in fact no knowledge of the real value of his property, and that he was without business experience, judgment, capacity and discernment to deal with them or with others in regard thereto.

This plaintiff further avers that the defendants herein, and each of them, were well acquainted with the forms of departmental oil and gas mining leases upon the lands of Indian Allottees of the Creek Nation, and were well acquainted with the terms of such leases and of the lease made by the guardian of this plaintiff with William H. Millikin, covering the lands hereinbefore described, and that said lease among its other terms contained the pro-

visions that at its expiration on February 8, 1911, the lessee was to leave upon the premises all of the casing in each of the producing wells which he had drilled thereon, and that said wells so drilled and cased were worth to the property under the condition which by the terms of said lease with Millikin they were to be left at the expiration thereof, and added more than one hundred thousand dollars to the value of the property, and that the value of said property at the date of the expiration of the lease with Millikin would be more than three hundred thousand dollars, and also well knew that by reason of the youth, inexperience and want of business experience, and want of judgment of the plaintiff herein the said plaintiff was not aware of the actual value of said property.

That sometime prior to the 24th day of August, 1909, the defendant, H. B. Martin, had been the regular retained and paid attorney of the plaintiff in this cause, and that said defendant, H. B. Martin, was at that time a member of the firm of Hainer & Martin, regular practicing attorneys of the City of Tulsa, Oklahoma, and that on or about the first day of January, 1909, the plaintiff herein had regularly employed and retained said firm of attorneys to counsel and advise him and to attend to his legal business; to collect monies that were due him from rents and royalties accruing from the land hereinbefore described, and to advise and direct him in the management of his business affairs generally.

That the defendant, H. B. Martin, while a member of the firm of Hainer & Martin, and while so retained and employed by this plaintiff had familiarized himself with the business affairs of the plaintiff and particularly with reference to the property in question in this suit, and the development of said property under the oil and gas mining lease hereinbefore referred to.

That the plaintiff reposed utmost confidence in the business judgment, faithfulness, integrity and ability of said attorney, H. B. Martin, and made the office of said defendant, Martin, his headquarters from about the first day of January, 1909, and continued to make such office his headquarters during all of the times hereinafter mentioned, and that during said period, this plaintiff was so thoroughly under the direction of said H. B. Martin and reposed such confidence in him, and in his advice, that he was willing to do almost without question anything that was counselled and directed by said Martin or anything the said Martin said was right or proper for him to do.

That the plaintiff was conscious of his own want of personal experience, business judgment and ability, and relied implicitly upon the judgment, advice, suggestion and directions of said attorney, H. B. Martin, and such confidence in and dependence upon said attorney on the part of the plaintiff was well known to each and all of the defendants herein.

That said defendants, knowing the status and value of the properties hereinbefore described, and well knowing the situation of the plaintiff in this cause with reference to his attorney, H. B. Martin, and knowing his want of business judgment and discretion, and his want of knowledge of the actual value of the property, and all of the facts herein set out, and they being desirous to possess themselves of this valuable piece of land, and to enjoy the wealth which it was producing, and would for a long period of time continue to produce, at some time prior to the 24th day of August, A. D. 1909, formed a conspiracy to defraud the plaintiff out of said property for a mere fraction of its real value, and entered upon a conspiracy and agreement to do and perform all things which might become necessary to effectuate that purpose and to do and perform all things which are herein set out and complained of, and for the purpose of effectuating said design and carrying out said conspiracy, they did on or about the 24th day of August, A. D. 1909, and while the plaintiff herein was still a minor, and incapable of making any valid lease of oil and gas mining properties or other contract with reference to the land hereinbefore described, procure the plaintiff to make and enter into an apparent oil and gas mining lease covering the lands hereinbefore described to begin at the expiration or cancellation of the William H. Millikin lease hereinbefore referred to, providing for a royalty of

one-eighth of all oil produced and saved from said premises and one hundred dollars for the product of each and every gas well while same was being sold off the premises, and which apparent oil and gas mining lease appears of record in the office of the Register of Deeds in Book 70, at page 10, and a copy of which is attached to this petition, marked exhibit "A," and made a part hereof, to the same effect as if said instrument was set out in full in this complaint, and that it was the understanding and agreement at the date of the execution of said pretended lease above set out that whenever this plaintiff should become of lawful age, he was to execute an oil and gas mining lease and to receive a cash consideration therefor of Seventeen Thousand Dollars in money, and a royalty of one-eighth of all oil produced from the premises.

That all of the negotiations at the time of making of said pretended lease above set out were made with the defendant, A. E. Bradshaw, by and through the defendant, H. B. Martin, he, the said Martin, being at the time the regularly retained, paid and acting attorney of this plaintiff, and that

said H. B. Martin actually prepared the lease hereinbefore referred to as exhibit "A," and made a part of this petition, and during all said negotiations, so advised this plaintiff and counselled with him in regard thereto, and then and there well

knowing that said property was of the value as hereinbefore alleged, stated and represented to the plaintiff that a bonus of Seventeen Thousand Dollars and a royalty of one-eighth of the oil produced from said premises was the best price that could be obtained for the same, and was all that said property and premises were worth, and that said defendant, H. B. Martin, made said representations to the plaintiff for the purpose of inducing him to subscribe said paper writing thereby putting himself in a position where he would be *prima facie* lessor of said premises, and apparently bound to the defendant, Grant R. McCullough.

That at the time the defendant, H. B. Martin, and all of the other defendants, well knew that the actual value of a valid lease upon said property in a form as the one signed by the plaintiff to said Grant R. McCullough, was at least Three Hundred Thousand Dollars, and that the representations made by the defendant Martin to the plaintiff were at the instigation of, and with the knowledge of, and concurrence therein of the other defendants, and were made for the purpose of inducing the plaintiff to sign said paper writing, thereby putting himself in the position where he would be apparently bound, and effectuating their final consummation of their design to strip him of his property for a mere fraction of its value.

That the defendant herein well knew that the paper writing of August 24th, 1909, hereinbefore



set forth as exhibit "A," was not a valid instrument in law, but they also knew that the plaintiff was unaware of the want of validity in said instrument because of said reliance upon the counsel and advice and direction of his attorney, H. B. Martin.

That prior to the 24th day of August, 1909, and to-wit: on the 18th day of September, 1908, the plaintiff had executed a warranty deed for the lands hereinbefore described to his mother, Lizzie Gilcrease, which deed was duly recorded in the office of the Register of Deeds in Record Book 33, at page 529, in Tulsa County, Oklahoma, and so appeared of record on the 24th day of August, 1909, but that said conveyance or attempted conveyance to Lizzie Gilcrease was understood by the plaintiff in this cause and by said Lizzie Gilcrease and by all the defendants herein as being simply in trust for the plaintiff, and the defendants knew that the plaintiff had from said Lizzie Gilcrease a declaration of trust, and a deed, but that the defendants in furtherance of their design, and for the purpose of so clouding the title of the plaintiff to said land as to make it as difficult as possible for him to recede therefrom, they procured the execution by said Lizzie Gilcrease to the defendant, Grant R. McCullough, on the 4th day of September, 1909, of a pretended oil and gas mining lease upon the property hereinbefore described, the recited consideration named in said pretended lease being the consideration named in the lease of August 24th, 1909, from

the plaintiff to said Grant R. McCullough, and no other consideration whatever in fact being given, and further reciting that said Lizzie Gilcrease adopted, ratified and confirmed said lease from Thomas Gilcrease to Grant R. McCullough, a copy of said pretended oil and gas mining lease from Lizzie Gilcrease to Grant R. McCullough of September 4th, 1909, is attached to this petition, marked exhibit "B," and made a part of this petition.

That said pretended oil and gas mining lease above set forth as exhibit "B," was prepared by the defendant, H. B. Martin, who was at the time duly retained, paid and acting attorney of the plaintiff, and the said Lizzie Gilcrease being at that time at the town of Eureka Springs in the State of Arkansas, said Martin made a trip to Eureka Springs and procured said Lizzie Gilcrease to sign and execute and deliver said paper writing, all of which was done by the defendant Martin with the knowledge and consent at the instance of the other defendants herein, and done as a part and parcel of the conspiracy formed and entered into by and between the defendants herein, and for the purpose of carrying out said design and conspiracy, and accomplishing their purposes of obtaining the property of the plaintiff hereinbefore described for a nominal consideration, which would be but a fraction of its real value.

That in furtherance of said conspiracy, the defendants on or about the 12th day of April, 1910, procured the appointment of A. E. Bradshaw as guardian of the plaintiff, the application for said appointment being made to the County Court of Tulsa County, Oklahoma, said application being made by the defendant, A. E. Bradshaw, and the defendant, Bradshaw, being represented therein by the defendant, H. B. Martin, and said H. B. Martin being at the time the regularly retained and paid attorney of the plaintiff herein, and that in order to procure the appointment of said A. E. Bradshaw as such guardian, the defendant procured from the father of the plaintiff his written consent to such appointment and waiver of the right to act as such guardian.

That thereafter, and on or about the 21st day of April, 1910, in furtherance of said conspiracy, and for the purpose of continuing the relationship between the plaintiff herein and the defendant Martin and other defendants, said defendant Martin procured from the plaintiff herein a written contract of employment wherein and whereby the said defendant Martin, although still a member of the firm of Hainer & Martin, was employed individually as the attorney of the plaintiff to represent him in general in and about all of his litigation, and all business affairs for the term of one year from the 21st day of April, 1910, which contract was made and entered into with full knowledge of the other

defendants herein. A copy of which contract is hereto attached, marked exhibit "C," and made a part hereof.

That on or about the 22nd day of October, 1910, the plaintiff applied to the defendants for a release from the apparent contract and agreement which he had entered into and hereinbefore set forth, and which stood in the name of the defendant, Grant R. McCullough, but which was in reality for the benefit of all the defendants, and upon the defendants refusing to release said pretended contract, he counselled with his attorney, H. B. Martin, in whom he still reposed the utmost confidence, and who was still in his employ, and regularly retained and paid by the plaintiff, and was advised by his said attorney that he would be compelled to carry out said pretended contract whether he wished to do so or not, and that he was bound thereby, although in truth and in fact said defendant Martin well knew that said pretended contract was not valid in law, and could not be enforced, and was not binding on the plaintiff but said Martin advised the plaintiff that he would be compelled to carry out said contract as a part of the fraudulent and corrupt design previously formed by the defendants herein of obtaining the property of the plaintiff, and said defendant Martin further advised the plaintiff that if he could procure a part of said contract, the best thing for the plaintiff to do was to take back from Grant R. McCullough an assignment of a half in-

terest in the same for the sum of Thirty Thousand Dollars, and in order to induce into the mind of said plaintiff that he, Martin, was acting in perfect good faith, and to continue his domination over the plaintiff, and over the judgment of the plaintiff, said to him, that he, Martin, would take a half interest in said half. In other words, that they would each take an assignment of one-fourth interest from McCullough, and each pay fifteen thousand dollars therefor.

That the plaintiff still reposing confidence in his said attorney, and still being dominated by him, and still relying on such attorney's integrity and sound business judgment, and ability, and on the representations so false and fraudulently made by said defendant Martin for the purpose of carrying out the conspiracy herein alleged, the plaintiff acceded to said Martin's suggestion and representations, and it was agreed that said Grant R. McCullough should assign to the plaintiff a one-fourth interest in his pretended lease, and to the defendant, H. B. Martin, a one-fourth interest in said pretended lease, and that the plaintiff should pay for such one-fourth interest the sum of fifteen thousand dollars, and H. B. Martin should pay for such one-fourth interest a like sum of fifteen thousand dollars.

That previous to the 22nd day of October, 1910, the defendants had paid to this plaintiff the sum

of four thousand dollars of the seventeen thousand dollars which they had on the 24th day of August, 1909, agreed to pay for the lease upon said premises, leaving still due to the plaintiff according to the terms of the pretended lease of August 24th, 1909, and the contract and agreement under which same was made, the sum of thirteen thousand dollars, and this plaintiff relying upon the representations of the defendants, and particularly of the defendant, H. B. Martin, his attorney, paid over to Grant R. McCullough the sum of two thousand dollars in money, being the difference between said thirteen thousand dollars and the sum of fifteen thousand dollars, and which he, the plaintiff was to pay for such one-fourth interest, and said transaction being in full satisfaction of all balance and remainder of the seventeen thousand dollars agreed to be paid the plaintiff under the lease of August 24th, 1909.

That although the defendant, H. B. Martin, represented that he was paying a like sum of fifteen thousand dollars to the defendant, Grant R. McCullough, for an assignment of the one-fourth interest in the lease upon the premises hereinbefore described, said Martin did not in fact pay said sum of money or any other sum for the assignment to him by McCullough of the one-fourth interest to said Martin, and said McCullough for the purpose of carrying out their design, fraudulently represented to the plaintiff that said payment of fifteen



thousand dollars was actually made by Martin, and that McCullough had actually assigned to Martin a one-fourth interest in said leasehold estate, all of which representations the plaintiff herein at the time believed and relied on and continued to believe up until a few days previous to the filing of this petition.

That, thereafter, and to-wit: on the 8th day of February, 1911, which was the day on which it was understood by all the parties that the William H. Millikin lease hereinbefore referred to expired, the defendants herein in furtherance of the conspiracy and design hereinbefore alleged, and while the defendant, A. E. Bradshaw, was still acting as the guardian of this plaintiff, never having been discharged by the court by which he was appointed or any other court, and while the defendant, H. B. Martin, was still retained, paid and acting as the attorney of the plaintiff, and while the closest business intimacy still existed between all of the defendants, and while the plaintiff was still relying upon the good faith of his guardian and of his counsel, and under the influence of his counsel and guardian, and while the plaintiff still believed the representations to him made by his attorney, Martin, and that he was bound by his former agreement with the defendant, Grant R. McCullough, and that Grant R. McCullough owned a one-half interest in the lease upon the premises, and that the plaintiff owned a one-fourth interest therein, and that

the defendant, H. B. Martin, owned the other one-fourth interest therein, and while the plaintiff was still unadvised of the actual value of the property and of the lease upon same, and was still without business experience and judgment necessary to enable him to appreciate the character of the transaction upon which he was about to enter, and while the plaintiff was still under the influence of the representations in regard thereto, which had been made to him by his counsel, guardian and the other defendants, and while the plaintiff was still incapable of making an oil and gas mining lease except through a duly appointed guardian, properly authorized thereunto by an order of the probate court by reason of the following Acts of Congress, to-wit: Section Seventeen of the Act of Congress of June 30th, 1902, commonly known as the Supplemental Agreement, which is in words and figures as follows:

“Any lease for mineral purposes may also be made with the approval of the Secretary of Interior and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.”

and of Section Four of the Act of Congress of March 1st, 1901, which is in words and figures as follows, to-wit:

“Allotments for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority.”

and also the Act of Congress of April 28th, 1904, Section Two whereof provides as follows:

“And full and complete jurisdiction is hereby conferred upon the District Courts in said Territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, Freedmen, or otherwise.”

and also of the Act of Congress of March 3rd, 1905, Section One whereof provides:

“No lease made by any administrator, executor, guardian or curator shall be valid or enforceable without the approval of the court having jurisdiction of the proceeding.”

and also Section 19 of the Act of Congress of April 26th, 1905, which provides as follows:

“And every deed executed before or for the making of which a contract or agreement was entered into before the removal of restrictions be and the same is hereby declared void”

and also of Section 20, which provides:

“That allotments of minors and incompetents may be rented or leased under order of the proper court”

and also Section 2, 3, 5 and 6 of the Act of Con-

gress approved May 27th, 1908, in words and figures as follows, to-wit:

“That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by the guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed ----- years, without privilege of renewal; Provided, that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise; And provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years.”

### Section 3:

“That no oil, gas or other mineral lease entered into by any of said allottees prior to the removal of restrictions requiring the approval of the Secretary of the Interior shall be rendered invalid by this Act, but the same shall be subject to the approval of the Secretary of the Interior, as if this Act had not been passed,”

all of which was known to the defendants, and the actual value of the property at the time being also known to the defendants, and the value of the wells upon the property being well known to the defendants, and it being well known by them to be of the value of not less than three hundred thousand dollars, the defendants fraudulently and corruptly induced the plaintiff, as the final step in the consummation of the conspiracy and design which they had entered into, to execute and deliver to them a certain paper writing purporting to be an oil and gas mining lease upon the terms hereinbefore described, for a royalty of one-eighth of the oil mined and saved from said premises and purported to vest in Grant R. McCullough a one-half interest, in the plaintiff, Thomas Gilcrease, a one-fourth interest, and the defendant, H. B. Martin, a one-fourth interest. A copy of said lease or contract is attached hereto, marked exhibit "D," and made a part hereof.

That by the terms of said contract or lease of February 8th, 1911, the defendant, Grant R. McCullough, purported to become the owner of one-half of the equipment on said premises, and the defendant, H. B. Martin, of one-fourth interest in said equipment then on said premises.

That the casing and lining in the forty-two wells upon the premises at that date was worth more than thirty-six thousand dollars. In other words,

more than twice the amount of the bonus originally promised and agreed to be paid by the defendants to the plaintiff for the entire lease upon the whole premises with forty-two producing wells situated thereon.

That upon the execution of the lease of February 8th, 1911, hereinbefore referred to as exhibit "D," the defendants procured the plaintiff to execute his note to the First National Bank of Tulsa, Oklahoma, for the sum of one thousand dollars to procure money for the purpose of employing hands and working the lease in question, and to purchase the necessary pumps, machinery and equipment for use upon said premises, and did not themselves invest or expend a single dollar in the development, equipment or working of said property, but bought all of the machinery which was bought for said premises on a credit and it was paid for out of the production from said premises, and that said property has produced and the defendants have taken therefrom since the 8th day of February, 1911, and there has been produced and saved from said premises and marketed and sold therefrom one hundred and seventy-five thousand barrels of oil of the value of seventy-two thousand dollars, and that out of said production, the plaintiff has received only the royalty of one-eighth, plus one-fourth of the remainder after there was paid therefrom the operating expenses and amounts for the machinery and equipment to work said lease, and



the defendants have received the other three-fourths of the proceeds of said lease over and above the royalty.

That on or about the 11th day of December, 1911, the defendant, H. B. Martin, offered to convey and did convey to this plaintiff for a valuable consideration in money and property then paid and delivered to the said H. B. Martin, amounting to the sum of thirty-one thousand dollars, and assigned and transferred to the plaintiff, three-fourths of the interest then held and claimed by said Martin in said lease, and that said H. B. Martin had previously by an assignment which appears of record in the office of the Register of Deeds of Tulsa County, Oklahoma, conveyed to the defendant, G. R. McCullough, who is the same person as Grant R. McCullough referred to herein, a one-fourth part of the interest claimed by Martin in said lease, which would be one-sixteenth interest in the entire lease. A copy of said assignment from Martin to Gilcrease is hereto attached, marked exhibit "E," and made a part hereof, and a copy of said assignment from Martin to McCullough is hereto attached marker exhibit "F."

That the defendants have since the 8th day of February, 1911, derived from sales of oil taken from said premises and appropriated to their own use that which was legally and equitably the property of this plaintiff, and the defendants, nor either

of the defendants, had any right, title or interest or any right thereto.

That the defendant, Al Brown, claims an interest in said lease, but the particular nature and character and extent of said interest this plaintiff is unable to state, nor is the plaintiff able to allege what proportion of the monies derived from the sale of oil taken from said premises since February 8th, 1911, said defendant, Al Brown, has received and appropriated to his own use.

That as hereinbefore stated and alleged, the only sum or amount ever paid by these defendants or either of them for the apparent lease obtained by them from the plaintiff through fraud and undue influence herein alleged and recited, was the sum of four thousand dollars, two thousand dollars of which has been repaid by the plaintiff in money and the other two thousand dollars of which has been paid over many times by monies driven by the defendants from the sale of oil taken by them from said property, so that there is now due from this plaintiff to the defendant nothing whatsoever, but on the contrary the defendants are indebted to the plaintiff in a sum exceeding thirty thousand dollars for and on account of money which they have had and received as proceeds from the sale of oil taken from the premises and by them appropriated to their own use and benefit, and by virtue of the fraudulent practices hereinbefore recited;

and the plaintiff has not received a dollar of the defendants, but if it shall turn out that the plaintiff is mistaken in this, or if it shall be adjudged and determined that any sum is due from the plaintiff to the defendants, or either of them on account of the matter and things herein alleged and stated, the plaintiff now and here offers to return and to repay to said defendants or such of them as the court may adjudge is entitled to receive same any such sum or sums as the court shall find such defendant or defendants entitled to, and to do full and complete equity in the premises, and hereby submits himself fully to the jurisdiction of this court, and prays that an accounting be had between him and said defendants, and offers to do whatsoever shall be adjudged by the court to be right and proper for him to perform, but in the end that he may have cancellation and rescission of the pretended contract now held by the defendants and under which they claim the premises in question, and upon which the oil is being taken and produced therefrom, and asks that the defendants and each of them be required to account fully for all oil or substances taken from said premises under said contract, and for all monies that they have derived by reason of the same.

That at the time the plaintiff obtained the assignment from the defendant, H. B. Martin, of three-sixteenths interest in the lease of February 8, 1911, being three-fourths of the interest in said lease

claimed by said Martin, he paid said Martin by surrendering to said Martin promissory notes theretofore given by said Martin to said plaintiff for five thousand dollars, and cancelled an open account owed by said Martin to the plaintiff for borrowed money to an amount of thirty-five hundred dollars, and transferred to said Martin one promissory note, executed by George W. Rose to the plaintiff for the sum of three thousand dollars, secured by real estate mortgage, and also one note executed by S. C. Maxey and wife to the plaintiff for the sum of fifteen hundred dollars, secured by mortgage on real estate, and executed to said H. B. Martin, deed of conveyance for the following described real estate situated in Tulsa, and Osage Counties in the State of Oklahoma, to-wit:

One deed for the south 50 feet of Lot 4, Block 183, one deed for the east  $37\frac{1}{2}$  feet of Lot 12, Block 1, in Bliss Addition, one deed for Lot 1, Block 2, Brennan Reed Addition, and one deed for Lots 6, 7, 8, 9, 10 and 11, in Block 3 of Northmoreland Addition. Tulsa, Tulsa County, Oklahoma, and one deed to the southeast quarter of Section 25, Township 17 North, Range 12 east, in Tulsa County, Oklahoma, and one deed to the NW $\frac{1}{4}$  of Section 17, Township 20 north, Range 12 east, and the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Section 20, Township 20 north, Range 12 east, Osage County, Oklahoma.

That said payments, transfers and conveyances by the plaintiff to the defendant, Martin, were

wholly without any consideration for the reason that the alleged and apparent interest in the lease aforesaid, was acquired by him as a result of the conspiracy entered into and carried out by the defendants as herein stated, and obtained from this plaintiff by fraudulent practice herein set out, and the apparent consideration given by Martin to the plaintiff of thirty-one thousand dollars above mentioned was in truth and in fact but a return from said Martin of all the property and all of the value received by the defendant, Martin, from the plaintiff at the time of the transaction whereby Martin assumed to assign to the plaintiff three-sixteenths of the lease of February 8, 1911, and obtained from the plaintiff thirty-one thousand dollars in choses in action and real estate.

That the property described herein is still producing large quantities of oil, to-wit, more than fifteen thousand barrels per month, and the monthly production is of the value of nine thousand dollars taking the present market price. That the defendants or some of them are continuing to receive, and are appropriating to their own use nine-sixteenths of the proceeds of the sales of oil produced from said premises, and that the plaintiff, although the rightful owner of all of said oil, has only received from said property seven-sixteenths of the proceeds of the sales of the oil therefrom after deducting the operating expenses plus his royalties of one-eighth of the entire production, and that the de-

fendants, unless restrained by proper order of this court, will continue to produce oil from said premises and to appropriate nine-sixteenths of the oil so produced after deducting one-eighth royalty therefrom to their own use and benefit, and that it is necessary for the best interest of said property that oil continue to be produced therefrom, and that the operation of the wells upon said land be continued and oil taken therefrom, and to this end that some competent person be appointed receiver to take and receive and hold subject to the order of this court all that portion of the oil produced from said premises over and above the one-eighth royalty which by the terms of the instrument set out to be cancelled by this suit is due the plaintiff, and the seven-sixteenths of the production from said premises which by the terms of said instrument this plaintiff is entitled to have and receive, and which the defendants admit the plaintiff is entitled to receive.

That unless the property involved in this suit is continuously operated, that is to say, if said forty-two producing wells upon the premises described in this petition are shut down and oil not taken from them, such action will produce great damage to the property, and the property will never again be worth as much after such wells are shut down as before they were so shut down.

Whereas, on the other hand, if the defendants are allowed to continue the operation of said prop-

erty and to continue to take oil therefrom, they will continue to sell and dispose of same, and to appropriate nine-sixteenths of the proceeds to their own use and benefit, and the total amount of the oil in and under said premises will to that extent be damaged, and the only remedy which will be left to this plaintiff if he prevails in this cause will be a personal judgment for the value of the oil so taken by them and appropriated by them and appropriated to their own use, and the value sought to be recovered by the plaintiff herein will be greatly diminished.

Plaintiff further states to the court that both of the defendants, Al Brown and E. A. Bradshaw, are now and have at all times been parties to the conspiracy herein alleged and set forth, and to the various acts and things that have been done in furtherance thereof, and have had full knowledge of all that has been done in the carrying out of said conspiracy, participating in the intent thereof, and in the fraud thereof, and are now claiming and asserting some right and interest in and to the property in question by virtue of contracts and leases herein set out and referred to, and which stand on the record in the name of the defendant, G. R. McCullough and H. B. Martin, but that the precise extent of the interest of each of such defendants is unknown to the plaintiff as is also the precise nature of the instruments or contracts, promises or agreements under which they are holding or claiming



an interest in said property, but all of the apparent claims and interests of said defendants, Bradshaw and Brown, as of the other defendants, are wholly fraudulent for and by reason of the matters and things in this petition set out.

Plaintiff further states that he did not at any time prior to the first day of February, 1912, know of the conspiracy between the defendants herein or of the interest in the said lease of said guardian, nor of said Al Brown, nor that the defendant Martin had not paid the fifteen thousand dollars for the one-fourth interest in said lease, nor was he at any time prior to that date conscious of any of the frauds or undue influence of said Martin, and of said guardian or of any of the defendants herein, and had plaintiff known any of said facts, he would not have executed any of said instruments.

PREMISES CONSIDERED, PLAINTIFF PRAYS:

*First:* That the defendants and each of them be required by proper order of this court to refrain from the sale or disposition of any oil now on hand taken from said premises described herein, or which they are now taking from said premises which may be taken by them from said premises at any time during the pendency of this litigation, and from receiving the proceeds of any oil which may have been taken from said premises and sold to any person, firm or corporation, or now in the pipe line of any such person, firm or corporation, and for

which they have not yet received payment.

*Second:* That some discreet and competent person, competent to manage and operate said lease be appointed receiver to take charge of nine-sixteenths interest in the leasehold upon the premises described herein, now claimed by all the defendants and which nine-sixteenths interest the plaintiff claims in equity and good conscience to be his property, and which he is seeking to recover in this cause by cancellation of the instrument under which the defendants are claiming title to same, and that said receiver be empowered and authorized to market said nine-sixteenths of the whole amount of oil taken from said premises over and above the royalty and operating expenses, and to collect and receive monies derived from the sale thereof, and to hold same subject to the order and disposition of this court, and also to market that portion of any oil on hand at the filing of this suit which would be the part thereof claimed by the defendants under the instrument, the cancellation of which is sought in this action, and to receive money for the same and hold said money subject to the order and disposition of this court, and also to collect and receive pay for the portion of any oil now in the hands of any person or company and claimed by the defendants which would have been coming to the defendants had this suit not been instituted, and to hold all of said monies subject to the order of this court, and to do such other and further

things as the court shall by its order of appointment or any order subsequently made thereto, and to join with the plaintiff herein the operation of said premises, and to do and perform all such acts in furtherance thereof and in relation to said premises and the property as will protect the rights of all parties hereto under the authority and direction of this court by its order of appointment and such other and further order as the court shall from time to time make.

*Third:* - That the defendants and each of them be required to answer this bill of complaint and to show, but not under oath, answer under oath being hereby expressly waived, what amount of oil has been taken from the premises by them since the 8th day of February, 1911, exactly what amount has been expended by them for the equipment and for operating expenses, and exactly what sum they and each of them have derived and received from said proceeds in sales of oils taken from said premises, over and above the one-eighth royalty paid to the plaintiff, and to state and set forth such sums and portions as may have been paid by the plaintiff as his admitted share of the transaction from the lands and premises described herein, and generally to account to this plaintiff for any and all sums of money, all property, assets and values of every description that they or each of them have received from the premises mentioned and described in this petition or from or by virtue of any of the trans-

actions herein complained of, to the end that proper amount which may be due from each of said defendants to the plaintiff for and on account of said matters and things may be ascertained and determined and that upon such accounting, the plaintiff have judgment against said defendants and each of them for any and all sums which may be shown to have been received and obtained by them.

*Fourth:* That the court decree the cancellation of each and every of the several instruments under and by virtue of which the defendants herein or either of them are claiming and asserting any right, title or interest in or to the premises in controversy, or the oil or gas in and under said premises, or any leasehold interest therein or thereto, or any right to mine and to take oil and gas therefrom, and particularly that this court by its decree cancel, set aside and hold for naught the apparent lease of the plaintiff to the defendant, Grant R. McCullough, dated August 24th, 1909, and the pretended lease of Lizzie Gilcrease to Grant R. McCullough of September 5, 1911, and the pretended lease of Thomas Gilcrease to H. B. Martin and G. R. McCullough of February 8th, 1911, and the pretended assignment of H. B. Martin to G. R. McCullough of March 23rd, 1911, and that each and every one of said instruments be declared null and void, and the defendants and each of them and all persons claiming by, through or under them, or either of them, be forever enjoined from asserting any

right, title, interest or claim in and to said premises or any oil under said premises, under and by virtue of any or either of said pretended contract, leases, assignments and agreements, and that the title of the plaintiff in and to the premises hereinbefore described and the oil and gas therein and thereunder be quieted against the pretended interests of each and all of the defendants herein.

*Fifth:* That the defendant, H. B. Martin, be required to restore and refund to the plaintiff all the property acquired from the plaintiff under and by virtue of the transaction of December 11, 1911, hereinbefore particularly set out, and to repay to the plaintiff the amount for which said defendant Martin received credit on his note and indebtedness, and if he has not converted into money the choses in action delivered by the plaintiff to him, being made by third parties secured by real estate mortgages, that said notes be required to be by said defendant Martin returned and reassigned to the plaintiff, and that as to all of the real estate conveyed by the plaintiff to Martin, that the said conveyances from the plaintiff to Martin be cancelled, set aside and held for naught, and the title thereof reinvest in the plaintiff as fully and to the same extent as if any conveyances whatsoever had never been made by him to the defendant, Martin, and if it appears that any of said real estate or choses in action has been disposed of by said Martin so that it cannot be restored in kind or the title there-

to reinvested in the plaintiff, that the defendant Martin, be required to repay to the plaintiff the value thereof, and that any receiver appointed for the disputed portion of the oil involved in this cause be also authorized and directed to take charge of any of the choses in action transferred by the plaintiff to the defendant Martin during the pendency of this litigation, and to collect and receive from the debtors in said choses in action sums of money evidenced by the same or any part thereof remaining unpaid, and to do and perform any and all things necessary therein, and to hold the proceeds thereof subject to the order and discretion of this court.

*Sixth:* That the court make and enter any such further decree and make all such other and further orders herein as may be, and which the court shall in equity and good conscience deem proper.

*P. C. WEST AND  
BIDDISON & CAMPBELL,  
Attorneys for Plaintiff.*

*State of Oklahoma, Tulsa County, ss:*

Thomas Gilcrease of lawful age being first duly sworn on his oath states that he has read the above and foregoing petition, knows the contents thereof, and that the statements and allegations therein contained are true.

*THOMAS GILCREASE.*

Subscribed and sworn to before me this 14th day of February, 1912, W. W. Stuckey, Clerk District Court, by J. Q. Chambers, Deputy.

EXHIBIT "A."

OIL AND GAS MINING LEASE.

*This Agreement*, Made this 24th day of August, 1909, by and between Thomas Gilcrease, party of the first part, and Grant R. McCullough, party of the second part,

*Witnesseth:* That the said party of the first part, for and in consideration of the sum of seventeen thousand (\$17,000.00) dollars, the receipt of which is hereby acknowledged, and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased and does by these presents, grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns all the oil and gas in and under that certain tract of land hereinafter described and also all the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa County, State of Oklahoma, and described as follows, to-wit:



The south half ( $\frac{1}{2}$ ) of the northwest quarter ( $\frac{1}{4}$ ) and the north half ( $\frac{1}{2}$ ) of the southwest quarter of Section twenty-two (22), Township seventeen (17) north of Range twelve (12) east of the Indian Meridian, containing 160 acres.

The said party of the first part grants the further privilege unto the party of the second part, his heirs, successors and assigns, of using sufficient water and gas from the premises necessary to the operations thereon, and all rights and privileges necessary or convenient for conducting said operations, and the transportation of oil and gas, and gas, and the right to remove at any time, machinery or fixtures placed on the premises by said party of the second part.

*To Have and to Hold the Same* unto the said party of the second part, his heirs, successors and assigns, for the term of fifteen years and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the time of the expiration or cancellation of a certain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, and the said term of this lease shall run for fifteen years thereafter and as long thereafter as oil and gas is being produced as aforesaid.

In consideration whereof, the said party of the second part agrees to deliver to the party of the

first part, in tanks or pipe lines, the one-eighth (1/8) part of all oil produced and saved from the leased premises. And should gas be found on said premises in paying quantities, said party of the second part agrees to pay one hundred (\$100.00) dollars yearly for the product of each gas well while the same is being sold off the premises, but the party of the second part shall have the right to use sufficient gas, oil and water to drill all wells and for all purposes necessary or convenient in operating the same.

All rentals and other payments may be made directly to the party of the first part, or may be deposited to his credit at the Bank of Oklahoma in the City of Tulsa.

All the conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

*In Witness Whereof*, We have hereunto set our hands this 24th day of August, 1909.

THOS. GILCREASE,

*Party of the First Part.*

GRANT R. McCULLOUGH,

*Party of the Second Part.*

*State of Oklahoma, County of Tulsa, ss:*

On this 24th day of August, 1909, before me, A. B. Davis, a Notary Public in and for said County and State, personally appeared Thomas Gilcrease,

to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein named.

*Witness* my hand and official seal this 24th day of August, 1909. A. B. Davis, Notary Public. My commission expires November 26, 1911.

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### EXHIBIT "B."

#### OIL AND GAS MINING LEASE.

*This Agreement*, Made and entered into on the 4th day of September, 1909, by and between Lizzie Gilcrease, party of the first part, and Grant R. McCullough, party of the second part,

*Witnesseth*, That said party of the first part, for and in consideration of the sum of One (\$1.00) Dollar, and other good and valuable considerations, the receipt of which is hereby acknowledged and for the further consideration of the rents, covenants and agreements hereinafter provided, has granted, demised, let and leased, and does by these presents, grant, demise, let and lease unto the party of the second part, his heirs, successors and assigns, all the oil and gas in and under the said tract of land hereinafter described, for the purpose and with the exclusive right of drilling and operating thereon for said oil and gas, both as to wells now opened

and operated upon said land and as to all wells which may hereafter be drilled, opened and operated thereon, which said tract of land is situated in Tulsa County, State of Oklahoma, and described as follows, to-wit:

The south one-half ( $\frac{1}{2}$ ) of the northwest quarter ( $\frac{1}{4}$ ) and the north one-half ( $\frac{1}{2}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) north of Range Twelve (12) east of the Indian Base and Meridian, containing One hundred and Sixty (160) acres more or less.

The said party of the first part grants the further right and privilege unto the party of the second part, his heirs, successors and assigns, of using sufficient water and gas from the premises necessary to the operation thereon, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and the right to remove at any time machinery or fixtures placed on the premises by the said party of the second part.

*To Have and to Told the Same*, unto the said party of the second part, his heirs, successors and assigns, for the term of Fifteen (15) years, and as long thereafter as oil or gas is being produced therefrom by said party of the second part, his heirs, successors or assigns. The term of this lease to begin at the expiration or cancellation of a cer-

tain lease of said premises heretofore executed by William L. Gilcrease, as guardian of Thomas Gilcrease, to William H. Millikin, and the said term of this lease shall run for fifteen (15) years and as long thereafter as oil or gas is being produced as aforesaid.

The consideration named in a certain lease upon the aforesaid lands heretofore executed on the 24th day of August, 1909, by Thomas Gilcrease, to the said Grant R. McCullough consisting of a bonus of Seventeen Thousand (\$17,000.00) Dollars, and a royalty of one-eighth ( $1/8$ ) of the oil to be produced from said land as a part of the consideration of this lease. And the said party of the first part, Lizzie Gilcrease, hereby adopts, ratifies and confirms the said lease from Thomas Gilcrease to the said Grant R. McCullough.

All conditions and terms of this grant and lease shall extend to and be binding upon the heirs, successors and assigns of the parties hereto.

*In Witness Whereof*, We have hereunto set our hands this 4th day of September, 1909.

LIZZIE GILCREASE,

*Party of the First Part.*

GRANT R. MCCULLOUGH,

*Party of the Second Part.*

*State of Oklahoma, County of Tulsa, ss:*

On this 4th day of September, 1909, before me,

a Notary Public in and for said county and state, personally appeared Lizzie Gilcrease, to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that she executed the same as her free and voluntary act and deed, for the uses and purposes therein named.

Witness my hand and official seal this 4th day of September, 1909. C. W. Gillett, Notary Public. My commission expires April 12, 1912.

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EXHIBIT "C."

CONTRACT.

This contract made and entered into on this 21st day of April, 1910, by and between Thomas Gilcrease, party of the first part, and H. B. Martin, party of the second part,

*Witnesseth:* That this contract is made to take the place of and supersede a certain contract heretofore entered into on the 1st day of February, 1909, by and between Thomas Gilcrease and the firm of Hainer & Martin, and,

It is contracted and agreed that the said H. B. Martin will take charge of, and prosecute to the best of his skill and ability certain actions now pending as follows, to-wit:

A certain action in which the said Thomas Gilcrease is plaintiff and George C. Butte *et al.* are

defendants now pending in the District Court of Muskogee County, State of Oklahoma, and a certain other action in which the said Thomas Gilcrease is plaintiff and one William H. Millikin is defendant, now pending in the District Court of Tulsa County, State of Oklahoma. That in the said case of *Gilcrease v. Butte*, that the compensation of the said H. B. Martin shall be 10 per cent of whatever sum is recovered and collected in said cause whether by judgment or compromise, and that the said H. B. Martin shall pay out of said commission his personal expenses in attending to said cause and that the compensation of the said H. B. Martin for his services in the case of *Gilcrease v. Millikin* shall be 7 and  $\frac{1}{2}$  per cent of all sums of money collected from the said William H. Millikin and the other defendants in said cause, on account of the royalties for which said suit is prosecuted. And  $7\frac{1}{2}$  per cent of all damages which may be recovered and collected in said cause.

It is further contracted and agreed that the said H. B. Martin shall represent the said Thomas Gilcrease in whatever litigation he may be a party for a period of one (1) year from the date of this contract, and that the compensation to be paid for such services shall be the reasonable value of the same to be agreed upon between the parties hereto at the time.

It is further agreed that a retainer fee of \$200.00, the receipt whereof is hereby acknowl-



edged, shall be and is paid by the said party of the first part to the party of the second part, and that such retainer fee covers all services to be rendered, consultation, advice, examination of abstracts, and other services of a legal nature which may be required by the said party of the first part of the said party of the second part during the term of this contract, except the prosecution and defense of suits in court.

Provided, however, that the said H. B. Martin is to charge no commission upon such royalties as are admitted and paid without contest by the said William H. Millikin and ——— Colley, accruing upon said oil and gas lease from this date.

*In Witness Whereof*, we have hereunto set our hands this 21st day of April, 1910.

THOMAS GILCREASE,  
*Party of the First Part.*

H. B. MARTIN,  
*Party of the Second Part.*

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EXHIBIT "D."

CONTRACT.

*This Indenture*, Made and entered into this 8th day of February, 1911, by and between Thomas Gilcrease, G. R. McCullough and H. B. Martin,

*Witnesseth*: That for and in consideration of

the mutual covenants and agreements hereinafter contained, the parties hereto contract and agree that the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their respective heirs, administrators and assigns shall have and hold in the proportions hereinafter described, the exclusive right to mine oil and gas from and upon the premises hereinafter described, to-wit:

The south one-half ( $\frac{1}{2}$ ) of the northwest quarter ( $\frac{1}{4}$ ) and the north one-half ( $\frac{1}{2}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) north, Range Twelve (12) east of the Indian Meridian in the County of Tulsa, and State of Oklahoma, as long as oil and gas, or either of them, are found upon said premises in paying quantities.

The said Thomas Gilcrease shall receive as royalty for said leased premises one-eighth ( $\frac{1}{8}$ ) of all the oil mined and saved upon said premises, delivered in pipe line, and such royalty shall be paid at any time after the sale of such oil, upon demand of the said Thomas Gilcrease. And in addition to said royalty, the said Thomas Gilcrease, his heirs, administrators and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said property. The said G. R. McCullough, his heirs, administrators and assigns, shall have and hold an undivided one-half ( $\frac{1}{2}$ ) of the leasehold interest in said land; and the said

H. B. Martin, his heirs, administrators and assigns, shall have and hold an undivided one-fourth ( $\frac{1}{4}$ ) of the leasehold interest in said land.

And it is further contracted, covenanted and agreed that the parties hereto, their heirs, administrators and assigns, shall operate said lease for oil mining purposes from this date as long as oil and gas is found thereon in paying quantities, and that after the payment of the royalty hereinbefore provided for to the said Thomas Gilcrease, that all of the balance of the proceeds of the oil produced from said leased premises, less necessary operating expenses shall be applied to the payment of the cost of equipment of said lease until such equipment shall have been fully paid for out of said proceeds.

And it is further contracted, covenanted and agreed that the equipment now upon said leased premises, and hereafter to be placed upon said leased premises, shall be and remain the personal property of the said Thomas Gilcrease, G. R. McCullough and H. B. Martin, their heirs, executors and assigns, in the proportion of the interests of said parties in said leasehold, as evidenced by this contract.

And it is further covenanted, contracted and agreed that the said parties shall not remove any of said equipment, including powers, engines, tanks, lead pipes, houses, tubing, rods, casings or any other portion of said equipment from any wells

upon said leased premises, as long as oil is produced from said wells in paying quantities, but that when such wells shall become exhausted, and no longer produce oil in paying quantities, then such equipment may be removed by said parties hereto, their heirs, administrators and assigns.

And it is further covenanted and contracted that the expenses of operation of said leased premises for mining purposes shall be paid by the parties hereto in the proportion of their respective interests as hereinbefore described, except that the royalty interest of the said Thomas Gilcrease shall not be liable for any of the expense of the equipment or operation of said lease, and shall be free from any expenses whatever.

*In Witness Whereof*, we have hereunto set our hands this 8th day of February, 1911.

THOMAS GILCREASE,  
G. R. McCULLOUGH,  
H. B. MARTIN.

*State of Oklahoma, County of Tulsa, ss.*

Before me, Benjamin C. Connor, a Notary Public in and for said County and State, on this 8th day of February, 1911, personally appeared Thomas Gilcrease, G. R. McCullough and H. B. Martin, to me known to be the identical persons who executed the foregoing instrument, and acknowledged to me each for himself that they exe-

cuted the same as their free and voluntary act and deed, for the uses and purposes therein set forth.

*In Witness Whereof*, I have hereunto set my hand and affixed my notarial seal the day and year first above written. Benjamin C. Connor. My commission expires March 29, 1911.

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EXHIBIT "E."

*Know All Men by These Presents*: That for and in consideration of the sum of One Dollar (\$1.00) and other good and valuable considerations, the undersigned H. B. Martin has bargained, sold, released and assigned and does by these presents bargain, sell, release and assign unto Thomas Gilcrease of Tulsa, Oklahoma, his heirs, administrators and assigns, an undivided three-fourths ( $3/4$ ) of all the rights, title and interest derived, had and held by the said H. B. Martin in and to the oil and gas mining right upon the following described real property, to-wit:

The south one-half ( $S1/2$ ) of the northwest quarter ( $NW1/4$ ) and the north one-half ( $N1/2$ ) of the southwest quarter ( $SW1/4$ ) of Section Twenty-two (22), Township Seventeen (17) north, Range Twelve (12) east of the Indian Meridian, in the County of Tulsa, and State of Oklahoma, under and by virtue of a certain contract of mining lease executed between the said Thomas Gilcrease, G. R. McCullough and the said H. B. Martin on the 8th

day of February, 1911, it being the intent of this assignment to convey to the said Thomas Gilcrease all rights, title, interest and privilege of the said H. B. Martin in the aforesaid contract of lease so far as the same affects the said undivided three-fourths interest of the said H. B. Martin.

It is further covenanted and contracted that the assignee, Thomas Gilcrease, assumes all obligations of the said H. B. Martin as to the said three-fourths interest, as to the expense of operating and equipping said leased premises.

*In Witness Whereof*, I have hereunto set my hand this 11th day of December, 1911.

(Signed) H. B. MARTIN.

*State of Oklahoma, Tulsa County, ss.*

Before me, Guy L. Reed, a Notary Public within and for said County and State, on this 11th day of December, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the above and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth. Guy L. Reed, Notary Public. My commission expires Aug. 21, 1912.

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EXHIBIT "F."

ASSIGNMENT OF LEASE CONTRACT.

*Know All Men by These Presents: That I, H.*

B. Martin, of the city of Tulsa, Oklahoma, for and in consideration of the sum of One (\$1.00) Dollar, to me in hand paid, the receipt whereof is hereby acknowledged, have bargained, sold, assigned, transferred and set over unto G. R. McCullough of Tulsa, Oklahoma, his heirs, executors, administrators and assigns one-fourth ( $\frac{1}{4}$ ) of that part of the leasehold interest of the said H. B. Martin upon the following described real property, to-wit:

The south one-half ( $\frac{1}{2}$ ) of the northwest quarter ( $\frac{1}{4}$ ) and the north one-half ( $\frac{1}{2}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of Section Twenty-two (22), Township Seventeen (17) north, Range Twelve (12) east of the Indian Meridian, in the County of Tulsa, State of Oklahoma, evidenced by a certain written indenture made and entered into on the 8th day of February, 1911, by and between the said H. B. Martin, one G. R. McCullough and one Thomas Gilcrease; which said indenture appears of record in the office of the Register of Deeds of the County of Tulsa, State of Oklahoma, at page 538 in Record number 99 of said office.

To have and to hold unto him, the said G. R. McCullough, his heirs, administrators and assigns, according to the terms and subject to the obligations of the said written indenture of February 8th, 1911, aforesaid.

In witness whereof, I have hereunto set my hand this 2rd day of March, 1911.

H. B. MARTIN.



*State of Oklahoma, County of Tulsa, ss.*

Before me, Roscoe Adams, a Notary Public in and for said County and State, on this 23rd day of March, 1911, personally appeared H. B. Martin, to me known to be the identical person who executed the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

In witness whereof, I have heunto set my hand and affixed my Notarial Seal the day and year first above written. Roscoe Adams, Notary Public. My commission expires June 6, 1914.

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To this petition the defendants all filed answer in which they admitted that the petitioner was a citizen by blood of the Creek Nation, and in which they admitted:

And that he received the land described in his petition, as his allotment and admitted that the defendant McCullough was president of the First National Bank of Tulsa, Oklahoma, and that Bradshaw was the cashier of said bank, and that both had been stockholders of the Bank of Oklahoma, and that the defendant Martin had acted as their attorney at various times and cases for the period of four years previous, and that the First National Bank had taken over the business of the Oklahoma State Bank. They admitted that in August, 1909, W. H. Millikin had about forty-

two (42) producing oil wells on petitioner's land and that the defendant Martin was the attorney for the petitioner during the period of transactions set forth in petitioner's petition, and that he was Gilcrease's attorney in litigation against Millikin, concerning Millikin's wells on Gilcrease's allotment.

Defendants further admitted that on the 24th day of August, 1909, Gilcrease gave to defendant McCullough, an oil and gas lease on his allotment and that on the 22d day of October, 1910, McCullough transferred the one-fourth ( $\frac{1}{4}$ ) interest in the lease back to Gilcrease and a one-fourth ( $\frac{1}{4}$ ) interest to defendant Martin. Defendants also admitted that Gilcrease, on the 8th day of February, 1911, entered into the contract with the defendants, a copy of which is attached to the petition and marked "Exhibit D."

Defendants filed separate answers, their answers being found in the record, at pages following:

Answer of defendant H. B. Martin at page 28.

Answer of defendant G. R. McCullough at page 40.

Answer of defendant A. E. Bradshaw at page 49.

Answer of defendant Al Brown at page 56.

Defendants in their answers alleged that the petitioner had acted with them and received his part of the oil, as he was of age, as shown by the

rolls, and thereby ratified the leases and contracts entered into by him.

The petitioner filed replies to the answers of the defendants which are shown at pages 59 to 81 of the record.

The case was tried before the District Court of Tulsa County, and the petitioner introduced in evidence, a certified copy of that portion of the rolls of the Creek Nation applying to him, and a certified copy of enrollment record, which records are shown at pages 107 and 108 of the record. The plaintiffs did not object to those records for the reason that the date shown was not the date of the enrollment or not the date of the ages shown by the enrollment records, nor for the reason that the records offered did not constitute the entire record, but the record shows objections as follows:

MR. WEST: Plaintiff now offers in evidence certified copy of the enrollment record on file in the office of the Commissioner to the Five Civilized Tribes, pertaining to the enrollment of the plaintiff, Thomas Gilcrease, and certified by J. G. Wright, Commissioner to the Five Civilized Tribes.

JUDGE DIGGS: To which we object as being incompetent, irrelevant and immaterial and not shown that the certificate is made by the officer having custody and control of the original records.

MR. CRUCE: Let me add one objection: That the plaintiff having proven by the plaintiff

himself that he was twenty-one years of age on the 8th day of February, 1911, and not claiming that they were surprised at that testimony they cannot now contradict their own witness by record testimony.

**MR. BIDDISON:** We are not asking to do that by this, if the court please, we are asking to prove the limitation fixed by the Act of Congress when he became capacitated to handle his land and the proof of his actual age goes to his capacity and competency, not legal competency but his actual capacity, business capacity, to transact business, which is a competent matter for the court to consider in connection with the other facts and circumstances of the case to show the youth, experience, and so forth, but as to the legal disability the roll that is under Congressional Act as fixing the time before which he could not dispose of his property, we introduce this evidence not for the purpose of showing the actual age, Congress cannot change a man's age as a fact as our Supreme Court has said and as the Federal Court has said, the Congress could not by Act make a man twenty-one years of age who was not 21 years of age, but they can prescribe a limitation and did so in that act fixing the time at which he could handle his allotment. They could do that and did do it.

(Record, pp. 107-108).

The District Court found that the petitioner was a minor at the time of executing the lease, but held that whether the lease was void or voidable, that he expressly adopted same, after he had reached his majority, and the court rendered a judgment in

favor of the defendants. See page 112 of the record.

The petitioner filed his petition in error in the Supreme Court of the State of Oklahoma, and that court affirmed the judgment of the lower court; see opinion, pages 110 to 124, inclusive.

The Supreme Court of Oklahoma held that the enrollment record

“Is only conclusive that on that date (June 9, 1899) he (petitioner) had passed his 9th birthday and had not reached his 10th, and does not prove that he was a minor on February 8, 1911, the date of lease, sought to be set aside on the grounds of minority, which was four months and one day less than twelve years thereafter.” (See Paragraph 5, Syllabus.)

The court held the lease of August 24, 1909, absolutely void as in violation of the statute above referred to, but held the contract of February 8, 1911, sufficient, not as ratification, but as a lease, though it contained no operative words as such, and that it did not violate restrictions of said act.

## ASSIGNMENT OF ERRORS

1st. The Supreme Court of Oklahoma erred in refusing to be concluded by that evidence which the Act of Congress makes conclusive, the decision of said court being to the effect that actual age and not age as shown by the enrollment records is material inquiry in determining when restrictions are removed from a minor allottee's land.

2d. The Supreme Court of Oklahoma erred in holding in substance that the Act of Congress made actual age a material inquiry in determining questions arising under the act, so that the enrollment records are conclusive only as to YEARS of age and not conclusive as to the question arising under the act: "When could petitioner lease his allotment?"

3d. The Court erred in holding that the enrollment record was conclusive only in showing that petitioner passed his 9th birthday at the time of his enrollment, and not conclusive that he was of the exact age shown thereby.

4th. The Court erred in not holding that the term "conclusive evidence" as used in the Act of Congress means that class of evidence which, when produced, precludes judicial inquiry into actual age and makes immaterial any question, save: what age do the enrollment records show the allottee to be?

5th. The Court erred in holding that the contract of February 8, 1911, was a sufficient oil and gas lease, and was not void for having been given before the enrollment records showed petitioner to have reached the age of 21 years.

6th. The Court erred in holding the enrollment record, dated June 9, 1899, showed petitioner to be nine years old at that time, but was insufficient to show conclusively that he was a minor for all purposes arising under the act on February 8, 1911.

## **BRIEF OF AUTHORITIES AND ARGUMENT**

The first, second, third and sixth assignments can be discussed together.

The Act of March 1, 1901, 31 Statutes at Large, 861, ratified by the Creek Nation on May 25, 1901, and commonly known as the Original Agreement, is the first law passed by Congress providing for the allotment of Creek lands. Section 4 of the said Act is as follows:

“The allotment of any minor may be selected by his father, mother or guardian in the order named, and shall not be sold during minority.”

The Act of June 30, 1902, 32 Statutes at Large, commonly known as the Supplemental Agreement, ratified by the Creek Nation on June 26, 1902, became effective on August 8, 1902, and is the next Act of Congress affecting this title. It amended Section 37 of the Original Agreement so as to make it read as follows:

“Creek citizens may rent their allotment for strictly non-mineral purposes for a term not to exceed one year for grazing purposes only, and for a period not to exceed 5 years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes, and for a period longer than 5 years for agricultural purposes, and



leases for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character, violative of this paragraph, shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

The Act of April 21, 1904, 33 Statutes at Large 189, appropriating funds for the Indian Department, and fulfilling treaty obligations, provides as follows:

"And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, may, with the approval of the Secretary of Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe."

The next Act is that of April 26, 1906, Section 20 of which is as follows:

"That the allotments of minors and incompetents may be rented or leased under order of the proper court."

The next Act affecting this title is the Act of May 27, 1908, which contains the following provisions:

*“Section 1.* That from and after sixty days from the date of this Act the status of the lands allotted hertofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows:

All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen and as mixed blood Indians having less than half Indian blood including minors shall be free from all restrictions.”

*“Section 2.* That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal; Provided, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of Interior, and not otherwise, and provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males. \* \* \*

Section 3 provides:

“That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclu-

sive evidence as to the quantum of Indian blood of any enrolled citizen or freedmen of said tribes and of no other persons, to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedmen."

Section 5 provides:

"That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

Section 6 provides:

"That the persons and property of minor allottees of the Five Civilized Tribes, shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma \* \* \* Provided, that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law, by order of the court or otherwise."

The effect of these Acts upon the alienation and power to encumber the lands by a minor Creek has been frequently passed on by the courts, cul-

minating in the decision of the United States Supreme Court in the case of *Truskett et al. v. Closser*, 236 U. S. 223, decided February 3, 1915.

This was a case in which Goodman, a Cherokee of one-eighth Indian blood, made a lease on his lands of September 14, 1910, when he did not attain full age of 21 years until September 25, 1910, he having had the rights of majority conferred upon him by the District Court of Washington County on October 12, 1909. It will be noted that this minor was but 11 days short of being 21 years of age at the time of the execution of that lease, and between the execution of that lease, and the execution of the lease by the guardian which was confirmed by the proper probate court, his guardian executed a lease upon the same property to a different lessee and the question presented to the Supreme Court of the United States was whether the lease granted by the minor was absolutely void, and the Court held that the lease, just as a lease as was granted in this case, was absolutely void, and that the lease granted by the guardian and approved by the Court took precedence, and cited in support of its position the decisions of the Oklahoma Supreme Court in *Tirey v. Darneal*, 37 Okla. 606, 133 Pac. 614; *Tirey v. Darneal*, 37 Okla. 611, 132 Pac. 1087; *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755.

Also *Preddy v. Thompson*, 204 Fed. 955.

These cases would seem to settle the effect of

such a lease, and establish the proposition that the lease is void, but the contention is that it was void only in the sense of being voidable, and that the same was subject to ratification, and this is the issue to be met, and was the exact proposition decided by the trial court.

The principal case of *Truskett v. Closser* would seem to be conclusive against that proposition as well as of the invalidity of the lease in its inception, for it holds that the lease was so void that it could be ignored, by the guardian in granting a new lease, which would supplant it, and if it were merely voidable and its weakness consisted in the minority of the minor, it would be valid until the disaffirmance by him upon arriving at his majority, for as held in *Oliver v. Handlet*, 13 Mass. 237, a guardian cannot avoid his ward's contracts that are voidable only by reason of his minority. The same rule is laid down by Woerner on Guardianship, page 173. And that this is the rule in the United States Supreme Court is settled by *Sims v. Everhardt*, 102 U. S. 300 L. Ed. 87, where the court says:

“It is settled that an infant cannot disaffirm a deed while his infancy continues.”

If, then, the court, recognizing the rule that as to the disability of minority only, the deed or lease of a minor is only voidable and cannot be disaffirmed during minority, reaches the conclusion

that the lease such as was given in this case can be avoided during minority when that minority terminates in a very few days, it must be taken that they hold the lease so utterly void as not to be susceptible of ratification, and needs no disaffirmance.

This doctrine is the doctrine of the Oklahoma Supreme Court in decisions it has rendered, and it has uniformly held that conveyances of Indians before the removal of their restrictions were void, although the invalidity of conveyances was declared by Statute in the same language that we find governing the case at bar, as for instance, the case of *Rogers v. Noel*, 34 Okla. 238, 124 Pac. 976, where the Oklahoma Supreme Court held a conveyance by a Choctaw Indian, after the removal of restrictions, but before such removal was effective, was void and not merely voidable.

Conveyances by an Indian before he is shown to be of full age by the enrollment records are held to be void in the following cases:

*Bell v. Cook*, 192 Fed. 597.

*Bruner v. Cobb*, 131 Pac. 165, 37 Okla. 228.

*Tirey v. Darneal*, 133 Pac. 614, 37 Okla. 606.

*Coody v. Coody*, 136 Pac. 754, 39 Okla. 719.

*Phillips v. Byrd*, 143 Pac. 684, 43 Okla. 556.

*Reed v. Taylor*, 144 Pac. 589, 43 Okla. 816.

*Cornelius v. Yarbrough*, 144 Pac. 1030, 40 Okla. 375.

*Collins Inv. Co. v. Beard*, 148 Pac. 846, 46 Okla 310.

*Henley v. Davis*, 156 Pac. 337, — Okla. —.

*Bell v. Mills*, 148 Pac. 1173, — Okla. —.

*Carter v. Prairie O. & G. Co.*, 160 Pac. 319, — Okla. —.

*Egan v. Ingram*, 161 Pac. 225, — Okla. —.

*Catron v. Allen*, 161 Pac. 829, — Okla. —.

*Allison v. Crummey*, 166 Pac. 691, — Okla. —.

*Nardridge v. Smith*, 6 Okla. App. Court Rep. 378 (decided May 21, 1918, not yet officially reported).

*Southern Surety Co. v. ————*, 6 Okla. App. Court Rep. 451 (decided May 28, 1918, not yet officially reported).

*Campbell v. Daniels*, 6 Okla. App. Court Rep. 554 (decided June 26, 1918).

*Etchen v. Cheney*, 235 Fed. 104.

*Barbre v. Hood*, 214 Fed. 473.

**When did the petitioner arrive at the age when he could lease his land?**

The enrollment records of the Creek Nation show that the petitioner was nine years of age when he was enrolled June 9, 1911.

Section 3, the Act of Congress of May 27, 1908, is as follows:

That the rolls of citizenship and freedmen



of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and no other persons to determine questions arising under this Act and the enrollment records of the commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.

The Supreme Court of Oklahoma held that this was evidence that petitioner was 21 years of age on June 9, 1911, but holds that it does not show that he was not of age at some time previous to that date, and that the enrollment records are not conclusive that he had not arrived at the age of 21 previous to the above date, but that he might have arrived at the age of 21 during the 12 months previous to that time.

We think it clear that Congress must have had some purpose when enacting the above quoted legislation and that purpose was to fix a definite date on which mixed blood citizens of the Five Civilized Tribes would have the right to alienate their allotments. Congress could not have intended by legislation to say when an Indian arrived at the age of 21 years, but Congress could say, and we think intended to say, at what time the Indians could sell their lands.

**Congress also intended to do away with the uncertainty among the Indians as to when they actually**

became of age, and to render certain and definite the rights of the Indians and the people dealing with them, and remove the temptation of litigation and perjury in contests as to when an Indian arrived at the age of majority.

The first construction of this section by any court, was the United States Circuit Court, for the Eastern District of Oklahoma, in the case of *Bell v. Cook*, 192 Fed. 597. The court in this case says:

“By section 3 of the act of May 27th, above quoted, it is seen that Congress declared the public rolls of citizenship and of freedmen members of the Five Civilized Tribes conclusive evidence of the quantum of Indian blood possessed by an enrolled citizen or freedman, and by the enrollment records of the commission of the age of any enrolled citizen or freedman to be conclusive of the age of such person in the determination of the right of such person to alienate their allotments. The object, purpose and intent of Congress by this portion of the act was not by its *ipse dixit* to make that which was black white, or the reverse, nor was it enacted for the purpose of putting questions of fact beyond the pale of judicial inquiry. This, of course, it could not do and would not assume to attempt. On the contrary, however, said portion of the act, and the public rolls prepared under authority of Congress as well, were all part and parcel of a general scheme worked out and employed by the government in the allotment of tribal property in severalty to the members of the tribes and in an endeavor to protect such allottees in their several property rights by such means

and to such extent as the exigencies of the case, the ignorance and environment of the allottee considered, was demanded for the best interests of the wards of the government. In carrying out this scheme of protection Congress, as it had the undoubted right to do, defined the word 'minor' as it did therein and referred any and all persons intending to become purchasers of any portion of the tribal property from an allottee thereof, not to the uncertain hazard of a judicial inquiry based on the evidence of ignorant, incompetent and interested witnesses, but to the fixed and definite public rolls to ascertain whether such allottee did or did not possess the qualified age or requisite degree of Indian blood to confer on him the power of disposition under the law. If an intending purchaser from an allottee of tribal property holding the public rolls in one hand, and the act in the other, by a comparison of the two found such allottee possessed of the power of disposition under the act and the rolls, he was at liberty to purchase and he was protected in such purchase. If, on the contrary, the law and the public rolls considered together denied the right of the allottee to convey, a purchaser from such allottee was not protected, and this regardless of the true state of facts as they might be made to appear in this case."

The Supreme Court of Oklahoma, in the case of *Yarbrough v. Spalding*, 123 Pac. 843, 40 Okla. 447, in construing section 3, the Action of May 27, 1908, say:

"And having under consideration this iden-

tical act of Congress, this court, speaking through Mr. Justice Hayes, in the case of *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755, said: 'It is unnecessary to comment upon the extent or limitation of the authority over the lands and property of such Indians that is by said provision of the enabling act reserved to the United States government; for, whatever be the extent of that authority or its limitations, we think it cannot be questioned that said authority reserved is sufficient to retain in the government of the United States jurisdiction over the restricted lands of said Indians to determine and provide how and in what manner such restrictions shall be removed; and that, until such restrictions are removed, the lands of said Indian minor allottees are not within the jurisdiction of the probate courts of the state, with power in said courts to order the sale thereof for any purpose. Since the power to remove such restrictions is wholly within Congress, it may say upon what terms and conditions they will be removed, and under the supervision of what court or officer the sale of same shall be made.' Among the terms and conditions fixed by this act are found the provisions that the jurisdiction of the probate courts of the state of Oklahoma over the lands of minors and incompetents is made subject to the foregoing provisions, to-wit, the status of the lands, and thereunder was defined the term 'minor' or 'minors,' to the end that the state might not pass an act making either a less or a greater number of years conclude the minority of the parties with whom it was then dealing, or otherwise effect a change in their rights of

alienation. It was also provided that the rolls made by the Dawes Commission, approved by the Secretary of the Interior, should be conclusive evidence as to the quantity of Indian blood of any enrolled citizen or freedman; and that they should hereafter be conclusive evidence as to the age of the said parties in determining matters arising under the act. The power to thus legislate for these citizens of the state of Oklahoma was reserved to Congress by section 1 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 267), and recognized and sanctioned in section 3 of article 1 of the Constitution; and the state courts are bound, in good faith, to enforce these congressional regulations in reference to the lands of members of these tribes. The record introduced was one made under congressional authority by a commission organized for the purpose of perfecting these rolls. A census was authorized, if not directly enjoined, and the information, thus gathered at great expense, was in possession of Congress. All agree upon the purpose and end to be secured by restricting these allottees in their right to alienate their lands.

Counsel charge and admit on both sides that on a trial, wherein the question of the ages of these allottees arises, virtually no dependence whatsoever is to be placed in the accuracy of the testimony or evidence adduced. It is asserted and admitted to be a matter of general knowledge that these people generally kept but few, if any, records showing their family history or ages; and that as a consequence any proof adduced at any time in any controversy is subject to all the fluctuations incident to

ignorance or self-interest. This being true, Congress cannot be presumed to have been ignorant of these facts; and these ages, thus fixed by an impartial judicial commission, without interest to do aught else than, with such light as it could obtain, fix them correctly, were in the main more likely to be accurate than ages established at a time and under conditions where self-interest or ignorance would produce either deception or error. The stability of land titles is of paramount importance everywhere; and this wise and salutary statute of Congress will have much to do with permanently determining the same to a large quantity of this tribal land. Congress has not sought herein to make that which was false true, or to make that which was true false; the ages fixed were not for the purpose of establishing any rights whatsoever under the laws of the state; they were not conclusive of the age of consent, of marriage, or of the right to exercise the elective franchise; they refer solely to the determination of questions arising under the act. The fact that some of these ages are manifestly inaccurately stated in the records in nowise changes or alters the rule laid down. The power of Congress to say upon what terms restrictions should be relaxed or removed was absolute; and the act in this respect is, in our judgment, constitutional and valid."

The Supreme Court of Oklahoma, in the case of *Phillips v. Byrd*, 143 Pac. 684, 43 Okla. 556, in discussing this statute, say:

"It is clear to us that all Congress intended

to do by the enactment of that part of the statute under consideration was to prescribe a condition upon which this class of enrolled citizens and freedmen of the Five Civilized Tribes might alienate their lands. Congress, having reserved the exclusive right to legislate concerning the property of the Indian Tribes and their members, could have said, as a condition precedent to alienation, that an Indian should be considered a minor until he reaches the age of 25 years; and in such cases, the enrollment records of the Commission to the Five Civilized Tribes should be conclusive as to what date he would reach this age. Likewise, Congress could have provided that for the purpose of alienation, the members of the Tribes should be considered at full age at 15 years, and that the enrollment records should be conclusive as to when an enrolled citizen or freedman reached his majority, or the age which would authorize him to deal concerning his land."

The enrollment records are held to be the evidence of the Indian's age in the following cases:

*Bruner v. Cobb*, 131 Pac. 165, 37 Okla. 228.

*Tirey v. Darneal*, 133 Pac. 614, 37 Okla. 606.

*Coody v. Coody*, 136 Pac. 754, 39 Okla. 719.

*Reed v. Taylor*, 144 Pac. 589, 43 Okla. 816.

*Cornelius v. Yarbrough*, 144 Pac. 1030, —  
Okla. —.

*Collins Inv. Co. v. Beard*, 148 Pac. 846, —  
Okla. —.

*Barbre v. Hood*, 214 Fed. 473.



### DATE ON CENSUS CARD

There was introduced in evidence in this case the enrollment record consisting of a census card showing Thomas Gilcrease's age to be nine years and the Oklahoma court says that there is nothing to show when the application for enrollment was made as if the date of the application for the enrollment governed and further says that the date of this card has no probative force or effect. The syllabus of the case says that there was nothing on the face of the card to show that the date thereof, June 9, '99, was the date of application for enrollment, and the card was without probative force to prove that plaintiff was nine years of age on that date.

“Probative” in the law of evidence, means having the effect of proof, tending to prove, or actually proving, 32 Cyc. 405. Let us see, then, if there is in the dating of this card any probative force as to the date at which Thomas Gilcrease was determined to be nine years of age.

In *McDaniel et al. v. Holland*, 230 Fed. 945, cited by the court in its opinion, the court says that such a card as we have here, a general census card, represents a finding and judgment of the commission on the application as to the facts therein stated. This date, June 9, '99, appears in the lower right hand corner of the card and is a date, and apparently the date of the record, for it bears no other date and would therefore appear to be with-

out contradiction or explanation the date of the determination that Thomas Gilcrease was nine years of age.

It is common knowledge and common practice, so much so that courts take judicial knowledge of it and presume that the date in the margin of instruments are the dates of their execution. A date in the margin of a receipt, a bill, a note or a deed has been frequently held to be *prima facie* the date of its execution and here we have an instrument or record dated, and without contradiction or explanation. We have the rule refused, and refused, too, in spite of the fact that the court unconsciously, as did the Circuit Court of Appeals in *McDaniel v. Holland*, *supra*, give it probative force.

In *McDaniel v. Holland* the court gave it absolutely probative force to the extent that it went, of showing the time from which the age should be computed. It did it unconsciously and automatically.

That has probative force which the normal mind of man takes as some evidence and considers as of some weight for the determination of a fact in issue. The Oklahoma court did not find it necessary to say that other words appearing on the face of the certificate or card did not have probative force merely because they did not indicate anything as to the determination that Thomas Gilcrease was nine years of age, but unintentionally, automati-

cally and unconsciously the court did turn to this date as the probable date of such determination and of such instrument, and to that extent it did have to the Oklahoma court probative force, as it must have to every normal mind. It is to be noted that it is not a question of weight to be given to this evidence against contradiction or explanation, but it is a question, as the court stated it plainly, of probative force, and unconsciously the mind turns to this date as a date of the record, as it does to the date on a letter, to a date on any written instrument as a receipt, check or note. Notwithstanding the denial of the court of the probative force of this date it did have probative force to the mind of the court it would not have considered it, and in the absence of contravening evidence or contradiction caused the mind to turn to it as the date of an enrollment and of the record it is sufficient to establish that fact.

But further, the courts take judicial knowledge of the ordinary practices of the departments of government and that Congress in passing the law in question had knowledge of such practices, and when it adopted a record as evidence of a fact, it knew what that record contained and that the courts would know the practice and recognize such records as the courts recognize the signature of the officers that certify them, and it is common knowledge and the court would take judicial knowledge, and that it is common knowledge that the

date of these records is placed upon them in the manner in which this date is placed upon this card.

To be sure in the case of *McDaniel v. Holland*, *supra*, there was a specific proof that certain words, "Date of application for enrollment," had been inserted after the making of the record, and in addition to the apparent date on the card, which latter the court took as the determinative date and said that the card did show on that date he had passed his ninth birthday and had not yet reached his tenth.

The census card appears between pages 108 and 109 of the record, in the lower right-hand corner has the figures, "June 9, '99." That is the date of the enrollment and it is the universal custom of the Department of the Interior to so indicate it and is exactly like every census card that we have ever seen. And we submit that that is ample evidence before the court as to the time of the enrollment and unless that date is admitted to be the date of the enrollment in many instances the enrollment record could not possibly show the age of the Indian and another element would be injected into the Indian question and bring premature gray hairs to lawyers and judges of our courts.

## CONCLUSIVE EVIDENCE

The court erred in not holding the term "conclusive evidence" as used in the Act of Congress, to mean that class of evidence which, when produced, precludes judicial inquiry into actual age and makes immaterial any question save: what age does the enrollment records show the allottee to be?

The court overlooked the inherent nature of CONCLUSIVE EVIDENCE and of laws, making one fact conclusive evidence of another.

One of the principal controversies in this case is as to the age of Thomas Gilcrease on the 8th day of February, 1911, at the time he entered into a working contract covering the operation of his premises, this being the contract which the court in its opinion finds valid and from which it determines the rights of the parties, having properly found a previous contract dated August 24, 1909, to be absolutely void. The Act of Congress of May 27, 1908, chap. 199, sec. 3, provides that the enrollment records of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the age of an enrolled citizen or freedman. The court in its decision and opinion does not give that record conclusive effect and does not give the words "Conclusive Evidence" the legal effect to which they are entitled.

Conclusive evidence is defined by Bouvier as follows:

“Evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue.”

“Evidence upon the production of which the judge is bound by law to regard some fact as proved and to exclude evidence to contradict it.”

It is defined by *3rd Encyclopedia of Evidence*, page 268, as follows:

“Conclusive Evidence is that character of evidence which either forbids or dispenses with an ulterior inquiry as to the matter sought to be established by proof.”

In *Missouri, Kansas & Texas Railway Company v. Simonson*, 64 Kans. 802, 68 Pac. 653, 91 Amer. St. Rep. 248, the Supreme Court of Kansas says at page 808 of the Kansas Report:

“A statute which declares what should be taken as conclusive evidence of a fact is one which of course precludes investigation into the fact and itself determines the matter in advance of all judicial inquiry.”

In *Thompson Lumber Company v. Interstate Commerce Commission*, 193 Fed. 682, the court says:

“Conclusive evidence is that which is incon-

trovertible; that is to say, either not open or not able to be questioned."

From these authorities it is apparent that the effect of the Act of Congress is to withdraw the question of age from judicial consideration in determining the questions arising under that act and to make actual age immaterial and to fix for the purpose of the act the age shown by the enrollment records as the age by which minority or majority shall be shown. Most statutes which have undertaken to establish a rule of conclusive evidence have been declared unconstitutional by the courts as an invasion of the judicial function and as depriving persons of property without due process of law, and this decision has always been made upon the ground that such statutes prevent judicial inquiry into the actual evidence upon which the party rights depended, but many courts have upheld such statutes, but only in cases where the legislative department had the right to fix the substantive law and have held in all such cases that the establishing of such a rule of evidence was in effect the making of substantive law. See *Wigmore on Evidence*, vol. 2, sec. 1354, pars. 1-2, and in general upon the subject of Conclusive Evidence. See secs. 1353 and immediately preceding sections. To the same effect, see 3 *Ency. of Evidence*, pages 291-293, inclusive.

In no case in which the judiciary did not have the power to fix the substantive rights of the par-



ties and enact the substantive law upon the subject, have the courts upheld acts of that character. In *Commission of Fisheries et al. v. Hampton Roads Oyster Packers & Planters Association*, 64 S. E. Rep. 1041, the Supreme Court of Virginia had before it an act making conclusive evidence certain surveys of the waters adjacent to the State of Virginia to determine their character as oyster beds, and that court upheld the act and said that its effect was to preclude any judicial inquiry into the actual fact as to whether any other waters contained oyster beds and as to whether certain oyster beds were in such waters, and that court cites with approval *Gardner v. Bonstell*, 180 U. S. 362, 45 L. Ed. 574, in which latter case the United States Supreme Court follows the rule which it has long recognized in many other decisions, that the declaration of the political department of the government as to the character of public lands, whether mineral, non-mineral, desert, forest or otherwise, is conclusive upon the courts and precluded any investigation into the actual evidence. So in that class of statutes, like our own, which make the issuance of a tax deed conclusive evidence that the proceedings culminating in such deed were legal, have been uniformly upheld so far as the recitals in the deed referred to non-jurisdictional matters or matters over which the legislature had control and could create the substantive law. See *Joslyn v. Rockwell, et al.*, 28 N. E. Rep. 604, also *Larson v. Dickey*,

39 Neb. 463, 42 Amer. State Rep. 595.

The foundation and basis of all these decisions, whether they uphold the constitutionality of the act in question or deny its constitutionality is that they prohibit judicial inquiry into the fact, and leave as the sole subject of investigation the fact of the issuance of the deed and its recitals. So in *Safe Deposit & Trust Co. of Baltimore v. Marburg*, 72 Atl. 839, the Court of Appeals of Maryland held valid the act which provided that the failure to demand ground rent for twenty consecutive years shall be conclusive that such rent has been extinguished, to be constitutional and valid because the legislature had the right to fix the substantive statute of limitations and accruing of right by adverse possession and made by this act an actual inquiry as to the extinguishment of the rent proper, leaving only the question as to whether or not rent had been demanded within the period of twenty years.

Giving now these decisions and these authorities their force the effect of the Act of Congress is to say that the age of a Creek citizen or freedman is not an issuable fact in any controversy arising under the Act of Congress; that it has been taken out of judicial inquiry and settled by legislative enactment and that the only question for consideration by the court is: "What age does the roll show the citizen or freedman to be?" for by the

express terms of the Act, the enrollment records are the conclusive evidence of the age; that is the evidence which excludes every other form of evidence and every presumption, and substitutes for it the *ipse dixit* of the enrollment record, and it is as if Congress had said in cases involving the age of a citizen or freedman and the validity of his conveyances under the restrictions of this Act, "He is conclusively presumed to be of the age which the roll shows him to be."

If the enrollment record shows the actual birthday, then that controls; if the enrollment record does not give the birthday, but gives the age in years, then there is no presumption that he was of age before the roll shows him of age, but he will be presumed to be actually of the age that the roll shows him to be.

As stated by the court in *Commission of Fisheries v. Hampton Roads Oyster Packing Association*, *supra*, the purpose of the enactment was to prevent the needless litigation and perjuries that resulted from the judicial inquiry into the actual facts and to fix a certainty upon which all parties might depend. It is well known that our courts were filled with perjury upon the actual ages of the Indians and freedmen; that it resulted in uncertainty as to titles and endless litigation. Congress could have had no other purpose in this enactment than to terminate such litigation and such perjury and give certainty to titles; and to hold that the

words, Conclusive Evidence, as used in the Act of Congress, do not mean exclusive evidence as the courts have always held it to mean, is to reopen the door to all this perjury, to all this litigation, and to put a foundation of sand under the freed-man and Creek titles.

Congress has not enacted that the validity of conveyances should be determined by actual age, but that the validity of conveyances should be determined by certain conclusive rules; that is to say, by the age shown by the enrollment records, and to deny this conclusive and exclusive effect of the enrollment records is to deny the Act of Congress its force and to refuse to construe it in the light of the wrongs which it sought to remedy.

No opinion that has been handed down by any court upon this subject has ever construed what conclusive evidence means in the law, nor considered the effect of making the enrollment records conclusive evidence in the light of all the authorities discussing what conclusive evidence really is; that is, evidence which fixes a fact, eliminates judicial investigation of the primary fact, and makes the rule laid down by the legislature the sole guide to its determination.

It is not an attempt to make the actual ages different from what they were, but it is an attempt to say what the word "age," as used in the act shall mean and how it shall be determined and how it

shall be conclusively determined; and unless every authority that has ever discussed conclusive evidence or acts making one fact conclusive evidence of another, has misconstrued these acts and repeatedly held them unconstitutional because the effect of them was to prohibit any further evidence or judicial inquiry into the primary fact, has been in error, the holding of the court in this case is unsound.

It is the age shown by the rolls that is the sole subject of judicial inquiry and it is the age shown by the rolls that determines the validity or invalidity of a conveyance. The Act of Congress does not attempt to fix the birthday not in consonance with the fact. It does not attempt to say that a party may not have been older or younger, or may not have reached majority at an earlier date than shown by the rolls, but it does say that the roll is conclusive, and thereby exclusive evidence upon the subject of the word "age" as used in the act, for all purposes arising under the act and therefore there is no presumption of majority unless the record shows minority; but the conclusive presumption is that he is of the exact age shown by the enrollment.

If, as stated by these authorities, conclusive evidence excludes all other evidence and determines the fact, then the enrollment record excludes all other evidence and determines the fact of age for

the purpose of the act and days and months have nothing to do with the investigation unless shown by the record.

The following extract from the Secretary to the Chairman of the Senate Committee on Indian Affairs, shows the purpose of the Act under consideration.

DEPARTMENT OF THE INTERIOR.

Washington, February 6, 1908.

Honorable Moses E. Clapp,  
Chairman, Committee on Indian Affairs,  
United States Senate.

Dear Sir:

As a matter of broad policy and for the good of the Indians as well as of the community in which they live, this Department believes that just as soon as any Indians, or classes of Indians, are found to be reasonably competent to manage their own business interests, they should be made free from all restrictions. In this way they are given the same opportunity as other citizens of the United States to enjoy their property and to fulfill their destinies as citizens. This policy was adopted without overlooking the fact that in a community of reasonably competent white citizens, many of them are constantly losing or squandering all or part of their property, and that reasonably competent Indians will in all likelihood, do the same. Their ability having once been established, it is better that they should take their chances with their white neighbors, learning as all other citizens must, —by experience.

Until such reasonable competency is reached, however, it is exceedingly important to fulfill the trust imposed upon the government by the circumstances and conditions surrounding the history of the relations between the Indians and the white people of this country.

The claim of the new State of Oklahoma that all land possible should be made subject to taxation in order that the State, counties, and townships may be able to support their public institutions, especially the schools which are needed for the Indian children as much or more than for the whites, has properly so much weight that the government, for the sake of the Indians, should at this time, keeping in mind the considerations set forth above, go as far as possible in the direction of removal of restrictions.

For that reason the allottees of the Five Civilized Tribes should be considered, in respect to their business competency, rather from the standpoint of classes than of individuals, and the Bill (S. 4644) proposes to free from restrictions all classes, the members of which, as a whole, can be reasonably considered as competent as the rural Whites in other states. Thus, all allottees having no Indian blood, and allottees of less than half Indian blood are freed from restrictions. Other mixed blood Indians are made free so far as surplus land is concerned, their homesteads being protected until individual competency can be shown to the Secretary of the Interior. It is recognized that full-bloods, as a class, are not competent to compete in business relations with the Whites. For that reason all their restrictions are maintained for a period of twenty-five



years unless in individual cases competency can be conclusively shown or the Secretary of the Interior finds it advisable to sell all or part of the land of particular non-competents in order to use the proceeds under supervision of their material welfare.

Section 2 provides for the leasing of the restricted land. It leaves all leases for five years or less, except oil, gas, or mineral leases, in the hands of the allottees themselves in order that they may learn to transact business. In the case of leases for longer terms, and of the oil, gas or other mineral leases, the Indians will be allowed to negotiate for the lease contracts, but the arrangement will not be final until approved by the Secretary of the Interior.

Section 3 is a provision to prevent much litigation concerning the quantum of blood and age of allottees. It makes the rolls of citizenship and of freedmen conclusive evidence. Without such a provision much fraud and perjury might result.

Section 4 makes sure that the land from which restrictions are removed shall be taxable at once in order that the allottees, considered in classes as competent, may take up their share of the civil burdens of the State and counties in which they live.

Section 5 makes deeds, encumbrances, or leases, taken contrary to the terms of the proposed act, absolutely null and void. This is expressed unequivocally to facilitate the clearance of titles in those cases where such deeds have been acquired prior to the removal of restrictions, either in the hope that the laws

providing for restrictions, may be declared unconstitutional, or in order to cloud the title in such a way that the holder of the invalid deed may profit either in the purchase of the land at a low price or by receiving a compensation for removing the cloud.

-----  
Very respectfully,

James Rudolph Garfield,  
Secretary.

The Acting Secretary writes an identical letter under date of February 12, 1908, to the Chairman of the Committee on Indian Affairs of the House of Representatives.

The following letters show the contemporaneous construction:

Muskogee, Oklahoma,  
August 14, 1908.

Subject: Age of citizens of Five Civilized Tribes as same appears on tribal roll.

The Honorable  
The Secretary of the Interior.

Sir:

I have the honor to enclose herewith letters of R. D. Welbourne, of August 12, 1908, and C. D. Wolfe, of August 13, 1908, asking the construction this office places upon a question in connection with the ages of citizens of the Five Civilized Tribes. These are but two of the numerous inquiries I have received along the same line and as it is a matter of con-

siderable importance to persons investing in Indian lands, I consider it advisable that the Department pass on this question at the earliest practicable date.

The proposition is whether a citizen of the Cherokee Nation, for example, whose age appears on the final roll as fourteen years, said roll being approved as of September 1, 1902, would be considered as not having reached his majority until September 1, 1908, even though as a matter of fact it could be clearly established he was born April 15, 1887, and would be twenty-one April 15, 1908.

There is nothing in the records of this office to establish the exact age of any citizen except where birth affidavits have been required, and all of these cases, the persons in connection with whose enrollment such affidavits were required still lack several years of maturity. In the other cases testimony was taken and the question as to the age of persons for whom application was made was asked, but the answer given is in every case, so far as an examination of the record shows, given in years only and while the age is probably given to the nearest year, it may refer to the age of the applicant on his last birthday or his next subsequent birthday. Consequently, there is little in the records that would throw any light on this matter when the age as shown on the final rolls is in question.

In view of the numerous inquiries I have relative to this matter and its relative importance, I have the honor to request that this

matter be passed on at the earliest practicable date.

Respectfully,

(Signed) J. G. Wright,  
Commissioner.

WSDM (LKP)

End. 15-1.

\* \* \* \* \*

Through the  
Commissioner of Indian Affairs,  
Washington, D. C.  
3-2833

Land  
56330-1908  
E B H

August 24, 1908.

Subject: Computation of ages of citizens of  
Five Civilized Tribes.

The Honorable,  
The Secretary of the Interior,

Sir:

I have the honor to invite your attention to the enclosed letter of August 14, 1908, from J. G. Wright, Commissioner to the Five Civilized Tribes, enclosing letters from R. D. Welbourne, Chickasha, Oklahoma, of August 12, 1908, and C. D. Wolfe, Wewoka, Oklahoma, of August 13, 1908, asking that a rule be laid down for a computation of the ages of citizens of the Five Civilized Tribes. He says that these are but two of numerous inquiries that he has received regarding the same subject and he believes that the Department should pass on the question at an early date.

He presents the proposition in this manner:

‘Whether a citizen of the Cherokee Nation whose age appears on the final roll as fourteen years, the roll being approved as of September 1, 1902, should be considered as not having reached his majority until September 1, 1908, even though it could be clearly established that he was born on April 15, 1887, and would be twenty-one years of age on April 15, 1908.’

He reports that there is nothing in the records of his office to establish the exact age of any citizen, except where birth affidavits have been required, and in all these cases the persons in connection with whose enrollment such affidavits were required, still lack several years of their majority. In the other cases, testimony was taken regarding the age of persons for whom application was made but the answer given in every case, so far as an examination of the records shows, is given in years only and, while the age is probably that of the nearest year, Mr. Wright says he believes that it may refer to the age of the applicant on his last birthday, and he expresses the opinion that this character of records leaves the question of age in doubt.

It is very seldom that a person on being asked his own age, or the age of anyone else, gives any other than the age at the last birthday. The rule is so universal, in the opinion of the Office, as to justify a holding that in all cases where the age of a minor is given by parents or relatives, the age given relates to the last preceding birthday. The Act of Con-

gress approved May 27, 1908, (Public No. 140), provides (Section 3):

‘ \* \* \* the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.’

It was necessary that a rule be laid down with reference to the determining of ages of enrolled minors in the Five Civilized Tribes to prevent the production of fraudulent proof as to age by persons who purposed to take advantage of the lack of age and experience of allottees, and Congress decided that the records of the Commissioner to the Five Civilized Tribes should be the criterion of age because the presumption would be that at the time application was made for enrollment no circumstances existed that tended to induce misrepresentation regarding the ages of persons in behalf of whom proof was being submitted.

The Office recommends that the Department hold that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment shall be construed, for the purposes of the Government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise.

Very respectfully,

(Signed) F. E. Leupp,  
Commissioner.

MOC.

August 27, 1908.

WCP.

Approved,  
(Signed) Jesse E. Wilson,  
Assistant Secretary.

December 21, 1910.

\* \* \* \* \*

Attorney General for the Interior Department,  
Washington, D. C.

Dear Sir:

Section 3 of the Act of Congress approved May 27, 1908, (the restriction bill) provides, as follows:

‘That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes, and of no other persons, to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.’

You will observe that the language of the Act is ‘the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to age.’

If you will advise me, I would like to know what your office holds ‘the enrollment records’ to be. I understand that at the time minors were enrolled by their parents, guardians, curators and next friends, that the Commissioner to the Five Civilized Tribes required certain evidence; that a statement of the age



of the minor was required. But, later on it seems that in making the final roll the Commissioner to the Five Civilized Tribes has figured all ages from September 1, 1902. The question is, Does the sworn testimony given in by the party enrolling the minor allottee govern, or does the roll made up from the testimony govern, or in other words, do all birthdays of enrolled minors, by reason of this law, fall on September 1, for commercial purposes in dealing with their lands? Or, should one, in dealing with minors, go back of the roll and rely on the testimony upon which the roll is based?

As I understand it, if a parent had on August 1 of a certain year given in testimony and enrolled his child, that child, according to the roll book, would become of age on September 1, although he would be past his majority. While, on the other hand, if, in the same year, the parent had applied on October 1 and had enrolled said minor, the roll book would show him to be of age on the same September 1, when he might be under age.

This inquiry may be rather poorly expressed but you can determine from the foregoing what I desire to know, that is, what your office holds to be 'the enrollment records,' which the law makes conclusive evidence as to age.

Your answer will be much esteemed and will be an accommodation for which we will be greatly obliged to you.

Respectfully,

W. D. Humphrey,

By E. A. Titsworth.

WDH|EAT

Land  
Population  
101291-1910  
J E D

February 15, 1911.

\* \* \* \* \*

Enrollment  
records.

Mr. W. R. Humphrey,  
Attorney at Law,  
Nowata, Oklahoma.

Sir:

Referring to your communication of December 21, 1910, requesting information as to the Department rule for the computation of ages of the cancelled citizens of the Five Civilized Tribes of Oklahoma and as to what are considered 'the enrollment records,' you are advised that Section 3 of the Act of Congress approved May 27, 1908 (35 Stat. L., 312) provides that 'the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment should be construed for the purpose of the Government as represents the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the records show otherwise.

The enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based.

Respectfully,

(Signed) Frank Pierce,  
First Assistant Secretary.

2-WJG-11.

\* \* \* \* \*

Land

Population

88795-1910

JED

March 3, 1911.

Age of

Hattie Feland,

210 St. Botolph Street,

Boston, Massachusetts.

Madam:

Referring to your communication of November 6, 1910, in which you claim that the enrollment records are in error as to your age, and in which you request that correction be made in order that you may be able to mortgage your property, you are advised that the name of Hattie Feland appears opposite No. 4523 on the final approved roll of citizens by blood of the Chickasaw Nation, and that said person is reported on the roll mentioned as being at that time nine years of age.

The ages appearing on the final approved roll of citizens by blood of the Chickasaw Na-

tion were computed as of September 25, 1902. In Section 3 of the Act of Congress approved May 27, 1908 (35 Stat. L. 312), it was provided that

‘The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.’

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment should be construed for the purposes of the Government as representing the age of the applicant at that time and that the date of the application should be held to be the anniversary of the date of birth except where the records show otherwise.

The enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based. There is no authority of law for the Secretary of the Interior to alter the notation upon the rolls as to the age of the persons whose names appear thereon.

Respectfully,

(Signed) C. F. Hauke,  
Second Assistant Commissioner.

2-JWC-27

\* \* \* \* \*

Land-Allotments.  
114698-1912.

GR  
Age of Allottees.

December 23, 1912.

Mr. J. A. Baker,  
Attorney at Law,  
Wewoka, Oklahoma.

Sir:

The Indian Office is in receipt of your letter of November 12, 1912, asking to be advised as to the conclusiveness of the age of Seminole allottees as shown by the enrollment records.

You claim that the printed roll which you purchased of the Commissioner to the Five Civilized Tribes contradicts the Seminole tribal roll now in the custody of one Jackson Brown as to the age of Seminole allottees, and you ask to be advised as to which is correct.

The Commissioner to the Five Civilized Tribes in his letter of November 8, 1912, to you admits that 'the notation in the printed rolls furnished by this office that the age of Seminoles were calculated to December 31, 1899, is in error.'

Section 3 of the Act of Congress approved May 27, 1908, (35 Stat. L., 312) provides as to the age of allottees of the Five Civilized Tribes that 'the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

The question arises as to what are 'the enrollment records of the Commissioner to the Five Civilized Tribes' which are made conclusive evidence as to the age of allottees.

The Department on August 1908, held 'that

in all cases where the age of a minor is given by parents or relatives, the age given relates to the last preceding birthday. The age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment shall be construed, for the purpose of the Government, as representing the age of the applicant at that time, and that the date of the application shall be held to be the anniversary of the date of birth, except where the records show otherwise.'

The Department on February 15, 1911, held that 'the enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based.'

It will thus be seen that the age as given by the applicant in his application if the day, month and year to be given, governs and if only the year is given, which may be disputed, without the day and month, the exact age will have to be determined by the testimony taken.

Respectfully,

(Signed) C. F. Hauke,  
Second Assistant Commissioner.

12-RFP-18

\* \* \* \* \*

Land-Allotments.

3354-1913.

J E D

January 21, 1913.

Error as to age.

Hon. Robert L. Owen,  
United States Senate.

Sir:

I have the honor to acknowledge the receipt of your letter of January 9, 1913, in which was enclosed a communication of January 6, 1913, from A. E. Harper of Padden, Oklahoma, in which he alleges that there is an error on the final approved rolls as to his age.

Referring to your inquiry as to whether the error, if there is one, can be corrected, your attention is invited to Section 3 of the Act of Congress of May 27, 1908, (35 Stat. L., 312) which provides as to the age of allottees of the Five Civilized Tribes that—

‘The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of such citizen or freedman.’

The Department has held in view of the provisions of Section 2 of the Act of Congress of April 26, 1906, (34 Stat. L., 137), completing and closing the citizenship rolls of the Five Civilized Tribes on March 4, 1907, and of the provisions of the above mentioned Section 3 of the Act of Congress of May 27, 1908, as to the age and degree of blood of enrolled citizens and freedmen, that the final approved rolls of said citizens and freedman so far as enrollment, age and degree of blood of the enrolled citizens and freedmen are shown thereon are a finality and there is no authority of law for the alteration of the rolls in this respect.

Your attention is invited to the fact that while said Section 3 of the Act of May 27, 1908,



makes the "rolls" of citizens; and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of the tribes for the purpose of determining questions arising under the Act, said Act makes the 'enrollment records of the Commissioner to the Five Civilized Tribes conclusive evidence as to the age of said citizen or freedman.'

The Department on February, 15, 1911, held that 'the enrollment records consist of the tribal rolls, the testimony taken and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant was based.'

The enrollment records being in the possession of the office of the Commission to the Five Civilized Tribes, Muskogee, Oklahoma, it is suggested that you advise Mr. Harper to take up the matter with the Commissioner to the Five Civilized Tribes for the purpose of ascertaining what may be shown by said records.

Mr. Harper's letter is returned herewith.

Respectfully,

(Signed) C. F. Hauke,  
Second Assistant Commissioner.

1-REP-20

\* \* \* \* \*

Land-Allotments.

G R

Age of allottees.

December 23, 1912.

Mr. J. A. Baker,  
Attorney at Law,  
Wewoka, Oklahoma.

Sir:

In answer to your letter of January 13, 1913, requesting to be advised as to how you are to determine the age of an allottee, you are informed that you will have to ascertain the age of an allottee from "The Enrollment Records of the Commissioner to the Five Civilized Tribes," which consists of the tribal rolls, the testimony taken, and all other papers in connection with the application upon which the decision of the Department and the enrollment of the application was based, where there is any dispute as to the correctness of the printed roll. You can find out what the rolls do actually show by an inspection of the original rolls in the office of the Commissioner of Indian Affairs or exact copy thereof in the possession of the Commissioner to the Five Civilized Tribes, Muskogee, Oklahoma. The Indian Office has not stated that the printed rolls are worthless or are incorrect, and has no reason to believe that they are incorrect. Enclosures returned.

Respectfully,

(Signed) C. F. Hauke,  
Second Assistant Commissioner.

1-EVB-26

\* \* \* \* \*

Land-Allotments.

16516-13

J E D

February 21, 1913.

Computation of age of Cherokee citizens.  
Mr. W. W. Breedlove,  
Fairland, Oklahoma.

Sir:

The Office has received your communication of February 5, 1913, as to the computation of the age of a Cherokee citizen.

By Section 3 of the Act of Congress of May 27, 1908, (35 Stat. L., 312) it was provided that,

'The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes, as given in the application for enrollment, should be construed for the purposes of the Government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the records show otherwise. The enrollment records consist of the tribal rolls, the testimony taken, and all other papers considered in connection with the application, and upon which the decision of the Department and the enrollment of the applicant was based. The enrollment records pertaining to citizens of the Cherokee Nation are in possession of the Commissioner to the Five Civilized Tribes, Muskogee, Okla., and application should be made to said Commissioner for any information you

may desire as to what said records show concerning the date of majority of any person whose name is on the final approved citizenship rolls. The Office cannot advise you as to whether said enrollment records would be considered as conclusive proof of the age of a Cherokee citizen in a matter affecting his right to vote as a citizen of the State of Oklahoma.

Respectfully,

(Signed) C. F. Hauke,  
Second Assistant Commissioner.

2-MR-18.

\* \* \* \* \*

June 1, 1915.

Secretary of the Interior,  
Washington, D. C.

Dear Sir:

In re enrollment records Five Civilized Tribes.

Will you kindly advise us as to the construction placed by your office upon the figuring of the age of allottees in the Five Civilized Tribes when the birth affidavit is on file giving the actual date of birth of the allottee, when the census card showing the age at the date of application for enrollment, which last named date is several months later in the year than the actual date of birth of the allottee, shows the age to have been a certain number of years on the date of application for enrollment, while as indicated by the birth affidavit the allottee would in fact have been a fraction over an even number of years.

In view of the Acts of Congress and decisions of the courts the enrollment records are to be conclusive and any evidence on record

must be taken into consideration. The point on which we desire to be informed is as to whether or not that construction will be adopted which considers the actual age of allottees as shown by the affidavit of birth, or the arbitrary age established by the census card made up from the testimony taken at the time of enrollment in cases where the census card would indicate the allottees not to be of age until several months after the date indicated by the birth affidavit.

Thanking you for the information,

Respectfully yours,

Gum Brothers,  
By H. L. Norris.

NJ  
Land—Five Tribes  
62186-1915  
J E D

\* \* \* \* \*  
Computation of age of  
citizens of the Five  
Civilized Tribes.

June 8, 1915.

Messrs. Gum Brothers,  
Oklahoma City, Oklahoma.

Gentlemen:

The Office has received your communication of June 1, 1915, in which you make inquiry as to the method of computation of the age of allottees of the Five Civilized Tribes, and especially as to the determination of the date of birth.

By Section 3 of the Act of Congress of May 27, 1908, (35 Stat. L., 312) it was provided that:

‘The enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.’

It has been held by the Department that the age of any citizen or freedman of the Five Civilized Tribes as given in the application for enrollment should be construed for the purposes of the Government as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of birth, except where the enrollment records show otherwise. The enrollment records consist of the tribal rolls, the testimony taken and all other papers considered in connection with the application and upon which the decision of the Department and the enrollment of the applicant were based.

If you will furnish the name and roll number of the allottee you have in mind, the matter will be examined into, and you will be furnished such information as may seem appropriate in that particular case.

The enrollment records pertaining to the citizens and freedman of the Five Civilized Tribes are in the possession of the Superintendent for the Five Civilized Tribes, Muskogee, Oklahoma, and application should be made to said Superintendent for any information you may desire as to what said records show concerning the date of majority or date of birth of any person whose name is on the final approved citizenship roll.

Respectfully,

(Signed) E. B. Meritt,  
Assistant Commissioner.”

6-FLW-7

### CONTRACT OF FEBRUARY 8, 1911

The Court erred in holding that the contract of February 8, 1911, was a sufficient oil and gas lease, and was not void for having been given before the enrollment records showed petitioner to have reached the age of 21 years.

It will be noticed that the working contract of February 8, 1911, nowhere refers to the lease of August 24, 1909. There is no suggestion within its limits of the existence of any such original lease and it is apparent that it was the purpose of the draftsman to avoid having it appear that it was intended as the ratification of a forbidden contract, but it was intended to stand on its own base. Nor is there a single word of conveyance or operative word of lease or sale in the contract, but it is a bare partnership agreement, ineffective to convey any interest in the oil or gas or in the allotment itself, and it is to be noted that it is a contract, not between the original lessee and lessor, but between Gilcrease, McCullough and Martin and provides for operation of the property and a division of the proceeds, prescribing that the proceeds of the lease shall pay for its equipment, and as no equipment was had prior to that date and lessees were just going into possession on that date, it is apparent that Gilcrease should pay for all equipment; but that Gilcrease, McCullough and Martin should be the owners of it, and not only of the equipment to be placed upon the premises from the production,



but also all that was then on the premises.

There is not a penny of consideration for this contract. The evidence shows that no one but Gilcrease put up a penny for this equipment. One thousand dollars was required by the Supply Company and Gilcrease gave his note for it and the balance was paid out of the proceeds of the oil from the premises. The original lease did not provide for the lessees becoming the owner of the material on the grounds left thereby the previous lessee and which he must leave under his department lease, amounting to between \$40,000.00 and \$60,000.00 in value according to the uncontested evidence in the case.

As above stated, this working contract contains no apt or operative words of conveyance. Oil was discovered and a vested niterest in oil and gas existed. We say, therefore, that this instrument is insufficient to create an estate or convey any rights to McCullough and Martin. It is to be remembered that the original lease at least was absolutely void and this working contract is nothing more than an *habendum* clause of a deed or lease, and nothing is better settled in the law than that the *habendum* clause of a deed conveys no estate and will not enlarge an estate already conveyed; nor will it operate by estoppel.

The instrument in form providing that the parties "Shall have and hold" is the ordinary form

of the *habendum* clause of a deed, and it is uniformly held that such a clause, where the granting clause is insufficient, is ineffective to create an estate.

In *Brown v. Mantor*, 53 Amer. Decisions, 223, the Supreme Court of New Hampshire discussed an alleged conveyance in which the granting clause of premises was deficient and did not contain necessary operative words of conveyance, but which was followed by the *habendum* clause, "To have and to hold the premises to them, the said Silas and Lemuel, their heirs and assigns forever," and the Court said that on account of the absence of operative words of conveyance the *habendum* was insufficient; that nothing could be conveyed thereby and the instrument was void as a conveyance. The case is exhaustive in its review of the authorities and clear in its logic. So in *Thompson v. Gregory*, 4 Amer. Dec. 255, there was an attempted grant of an incorporeal hereditament, but on account of the insufficiency of the granting clause, the conveyance was held void. So in *Ingell v. Nooney*, 2 Pick. 362, the Court held that where the *habendum* was sufficient in form, that is to say, "To have and to hold," but the operative words of conveyance were such only as were suitable for a transfer of personal property and were not such as were used for the conveyance of real estate, that real estate would not pass thereby. So in *Sharp v. Bailey*, 14 Ja. 387, the Supreme Court of that state lays down

the rule as absolute that operative words of conveyance are necessary to the transfer of an interest in realty. The Court says:

“But another principle obtains and is applicable, that a deed must contain operative words sufficient to convey the interest of the person conveying it. Otherwise the title will not pass. So the rule is laid down. An instrument purporting to be a deed will be effectual if it contains in any part apt words of conveyance, but if no words importing a grant can be found therein it will be deemed void although in other respects formal and regular.”

*Hulleman v. Mounts*, 87 Inda. 178;

*Webb v. Mullens*, 78 Ala. 111.

In the last case the Court said:

“The title to land will be transferred from one person to another only by positive and appropriate language. It was not the intention of the statute to dispense with the use of any words whatever operative to convey. By the statute the duty is imposed upon the courts to liberally construe the words employed in the conveyances as words of transfer and give them effect and operation according to the intention of the grantor. There must, however, be some words intended as words of conveyance. They can not be supplied by judicial interpolation.”

And in the former case Mr. Justice Elliott says:

“It is also true that if no such words (op-

erative words of conveyance) are used, it will be deemed utterly void of force."

From these authorities it is apparent that the so-called ratification or working contract gave no interest in the oil or gas and no interest in the land and as the original lease was, under all the authorities, absolutely void, this instrument becomes itself wholly ineffective for any purpose.

### **RATIFICATION**

The authorities heretofore cited, would seem to settle the effect of such a lease, and establish the proposition that the lease is void, but the contention is that it was void only in the sense of being voidable and was subject to ratification.

The trial court held that the contract of February 8, 1911, ratified the void lease of August 24, 1909.

The Supreme Court of Oklahoma held in effect that the lease of August 24, 1909, was void and could not be ratified but that the contract of February 8, 1911, was a new lease.

The defendants contend that the purchase, by the petitioner, of defendant Martin after he was of age, according to the enrollment records, and the fact that he signed the division orders for the running of oil, and accepted money for his part, was ratification of the lease and of the contract of February 8, 1911.

We take it to be unnecessary to cite to this court the numerous decisions upon the invalidity of these leases and conveyances by Indians before the removal of restrictions, or upon lands which were restricted, but we shall undertake to present to the court the authorities making the distinction between void and voidable acts, leases and deeds, and to show that by the general rules of construction, the term void, when used in connection with transactions such as we have here, means absolutely void, and not susceptible of ratification, but before passing to that proposition, we desire to call the attention of the court to the fact that provision of the Act of June 30, 1902, which provided that any agreement or lease of any kind or character violative thereof, shall be void and not susceptible of ratification in any manner, and that no rule of estoppel shall ever prevent the assertion of its validity, is still in force.

It will be contended, as has been determined by the Oklahoma court, that the Act of May 27, 1908, undertakes to supplant all existing laws as to the imposition of restrictions, and that the subject matter of the said Act of May 27, 1908, is comprehensive in determining what the restrictions in the future shall be, and therefore may be considered as repealing all existing laws fixing restrictions, but it will also be noted that in the said first section of the Act of May 27, 1908, which undertakes to fix the scope of the act, and upon which reliance is made for the

unquestionably correct rule that it supplants the former acts as to restrictions, that the language is:

“From and after 60 days from the date of this act, the status of land allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or incumbrance, be as follows:”

This Act therefore only undertakes to fix the status of the land as to restrictions, that is, as to what the restrictions shall be, and does not attempt nor purport to cover the subject as to what the effect of the restrictions is, or should be, but to determine the period of the restriction and the lands subject to the restrictions. The Act does not purport to be comprehensive upon all subjects of Indian titles among the Five Civilized Tribes, nor to limit the effect of any other Act affecting these Indian lands, except so far as they fix the period of restrictions and determine upon what lands restrictions shall exist, so that the omission from the Act of May 27, 208, of language to the effect that any agreement or conveyance violative thereof should not be susceptible of ratification, and that no rule of estoppel shall ever prevent the assertion of their invalidity, not only furnishes no ground or basis for argument that such conveyances are to be treated as voidable only, but leaves in full force and effect the provisions of the former Act that such conveyances and incumbrances are absolutely void and not susceptible of ratification.

In addition to this, it is to be noted that the Act of May 27, 1908, which governs these lands and affects this lease, says that the same shall be "absolutely null and void." Stronger language cannot be found in the English.

Without dwelling further upon this proposition, we call the attention of the court to the rule that, ACTS OR CONTRACTS, DEEDS, LEASES OR CONVEYANCES IN VIOLATION OF THE LAW, OR OF PUBLIC POLICY, ARE ABSOLUTELY VOID AND NOT MERELY VOIDABLE, AND ARE NOT SUSCEPTIBLE OF RATIFICATION.

The contention that the lease to McCullough or the contract of February 8th, 1911, could be ratified by Gilcrease overlooks the distinction between contracts voidable for want of capacity and those void because in contravention of a statute or public policy declared by law.

The Oklahoma court recognizes this rule in *Pruitt v. Oklahoma Steam Bakery Company*, 135 Pac. 730, 39 Okla. 509, where the court said:

"Certificates of stock issued in violation of statute are wholly valueless, and void, without respect to the intent of the parties to over-issue. Ratification in its correct sense is impossible equally of illegal and void contracts, and contracts of a corporation to issue stock in excess of the amount authorized by its charter is not voidable only, but wholly void,



and cannot be ratified by either party; no performance on either side can give the unlawful contract any validity or be the foundation of any right of action based upon it."

The opinion cites *Paige on Contracts*, Section 511, and many decisions in its support.

So in *Harris v. McCraig*, 105 Pac. 558, the Supreme Court of Idaho held that any agreement, oral or written, whereby a homestead entryman agreed to convey part of the homestead, is absolutely void and not susceptible of ratification after the reception of the patent, and supports the decision with a long list of authorities to the same effect. The United States Statute requires the homestead entryman in making his final proof to subscribe an affidavit that he has not directly or indirectly alienated or agreed to alienate the land or any part thereof. In the last mentioned case, the court held that an action brought upon such a contract should be dismissed by the court whenever the illegality appeared in the evidence, whether relied upon by the defendant, or in any manner pleaded or not.

In *Cornelius v. Murray*, 31 Okla. 174, 120 Pac. 653, the court held that because of the provision of the Act of Congress of July 1, 1902, forbidding the enclosing of Choctaw and Chickasaw lands beyond a certain amount, that the agreement to sell the improvements and possession of lands held in violation of this Act was absolutely void, and fur-

nished no consideration for the promises to pay therefor, following the former case of *McLarthlin v. Ardmore Loan and Trust Co.*, 21 Okla. 172, 95 Pac. 779.

In *Garst v. Love*, 6 Okla.. 46, 55 Pac. 19, the Supreme Court of Oklahoma Territory laid down the rule that because enclosures of public lands were against the public policy, that a contract by which a party was to and did receive and pasture cattle upon the lands enclosed in excess of the amount permitted by the Federal Statutes was absolutely void.

In *Pinney v. First National Bank of Concordia*, 68 Kan. 223, the Supreme Court of Kansas lays down the rule that:

“It is a settled doctrine of the common law that contracts made in violation of statutes are void, and this is so although the statute may not expressly so declare.”

This was held in a case of a promissory note taken for a patent right without inserting the words “given for a patent right” in the note, and the note was held so void that a transferee could acquire no title to it.

So the Circuit Court of Appeals of the 7th Circuit, in the case of *E. St. Louis Connecting R. R. Co. v. Jarvis*, 92 Fed. 735, held:

“That a lease of a competing or parallel railroad, where prohibited by the Constitution,

is void *ab initio* so that no action can be maintained upon a covenant therein, notwithstanding the lessee has had the possession of the lease, since the void contract cannot be ratified."

In *Maxwell on Interpretation of Statutes*, 2nd Ed., p. 256, the rule is stated thus:

"In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word voidable would be understood as voidable only at the election of the person for whose protection the enactment was made, and who are capable of protecting themselves, BUT WHEN THE PERSONS ARE NOT CAPABLE OF PROTECTING THEMSELVES, OR WHEN IT HAS SOME OBJECT OF PUBLIC POLICY IN VIEW IN REQUIRING A STRICT CONSTRUCTION, THE WORD RECEIVES ITS NATURAL FULL FORCE AND EFFECT."

In *Hagin v. Wellington*, 52 Pac. 909, the court laid down the rule that a note given in ratification and consummation of a contract, void as against public policy, was itself void.

In *Puckett v. Alexander*, 8 S. E. 767, the Supreme court of North Carolina held that an express promise to pay for services rendered under an employment which was contrary to public policy and forbidden by law, it being the employment of an unlicensed physician, was void, and the court says:

“If the contract between two persons be void, and not merely voidable, no subsequent express promise will operate to charge the party promising even though he has derived a benefit from the contract.”

So in *Wilcox v. Edwards*, 123 Pac. 276, the Supreme Court of California holds that a contract made in violation of public policy is so void that it is not validated by a subsequent repeal of the law which made it invalid, and cites extended list of authorities to support the doctrine.

So in *Handley v. St. Paul Globe Publishing Co.*, 16 Am. St. Rep. 695, 41 Minn. 188, the Supreme Court of Minnesota held that the publication of a newspaper on Sunday was unlawful, and hence a contract concerning advertisements therein was void, and was not susceptible of ratification, even if the law was so changed after the contract was made, and before it was fully performed, as that it would no longer be void.

In *Bishop v. American Preservers Co.*, 157 Ill. 284, 48 Am. St. 317, the court held that a contract void as against the anti-trust laws could not be ratified, and although partly performed, constituted neither a cause of action nor a ground for defense when it had to be relied upon by the party.

In *Diving et al. v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654, the Supreme Court of United States says:

“A thing void as to all persons and for all purposes can derive no strength from confirmation.”

And so in *United States v. Grossmayer*, 76 U. S. 72, the court again says:

“A transaction originally unlawful cannot be made any better by being ratified.”

In *Boutelle v. Melendy*, 49 Am. Dec. 152, the court says:

“An illegal contract can neither be ratified nor become the consideration for a subsequent promise ”

This was held in the case of an action of assumpsit for the price of a horse and harness sold to the defendant, the property being at the time subject to a mortgage, and the law of New Hampshire forbade the sale of mortgaged property without the consent of the mortgagee.

So in *Lancaster County v. Fulton*, 18 Atl. Rep. 384, the Supreme Court of Pennsylvania holds that a contract void as against public policy, although not directly forbidden by statute, cannot be ratified by acquiescence, or otherwise.

In *Birkett v. Chatterton*, 43 Am. Rep. 30, the Court lays down the rule that no action lies to recover a minor's wages earned in an employment in which the statutes forbid minors to be engaged.

In *Fowler v. Scully*, 13 Am. Rep. 609, the Su-

preme Court of Pennsylvania lays down the rule that because the National Currency Act forbids the taking of securities for monies thereafter to be loaned, that a mortgage given to a National Bank to secure notes thereafter to be discounted was absolutely void.

In *Union Pacific R. R. Co. v. Kennedy*, 20 Pac. 696, the court held that a contract void as against the pre-emption laws was not susceptible of ratification, and that a subsequent contract based upon it is void, and it will be noticed that the pre-emption laws do not fix any penalty for the violation thereof, nor declare the contract to be void if violative thereof, but simply prohibits the entry of land by one person for the benefit of another, and the contract in the case cited was held violative of that provision although only incidentally so.

In *Howell, Administrator, v. Fountain et al.*, 46 Am. Dec. 415, the Supreme Court of Georgia holds that a contract is void and not susceptible of ratification where it is in violation of the policy of a treaty between the Creek Indians and the United States. This case is very instructive and lengthy. The contract involved the title to a tract of land that was restricted as follows:

“These tracts may be conveyed by the person selecting the same, to any other person for a fair consideration, in such manner as the president may direct. The contract may be certified by some person appointed for that

purpose by the president, but shall not be valid until the president approves the same."

The contract was made in violation of this provision, and as the Supreme Court of Georgia says:

"It is a contract in breach of a treaty, and therefore illegal and void. It was in contravention of public policy, the policy, to-wit, of humanity and justice to the Indians; the policy which our government has avowed from the beginning, and therefore void."

This decision shows clearly what it would seem it was not necessary to argue at this date, that the restrictions upon Indian lands are not only made for the benefit of the individual Indian, but that they are matters of public policy, which cannot be contravened, and that contracts made in breach or violation of these restrictions belong to that class of contracts that cannot be ratified, because public interest and public policy are involved, as well as the protection of those presumably incapable of protecting themselves.

In *Bank of Rutland v. Parsons*, 21 Vt. 199, the court says:

"Where the statute prohibits anything to be done, an act done in contravention of this prohibition must be adjudged inoperative and void if the statute cannot otherwise be made effective to accomplish the objects intended by its enactment."



In *Petitt v. Petitt*, 32 Ala. 238, the court held that a contract between a Chickasaw Indian who was entitled to a reservation under the treaty of 1832, and a white person, by which the former agreed to sell his reservation to the latter in the event the treaty be so modified as to permit such sale, and in case of no such alteration, to allow the latter to occupy the land for two years free of rent, is void as being contrary to the treaty.

The case of *Cox v. Grubb*, 28 Pac. 157, is very strongly in point. A contract was made between a surviving partner and the widow of the deceased partner who left minor children, and part of the individual creditors of the deceased partner, that the surviving partner should pay a proportionate share of the individual indebtedness of the deceased partner and retain all the partnership property, and the court held that such a contract was illegal and void, and that further promises made by the surviving partner in pursuance of such agreement to pay a proportionate share of the debts was void as founded on an illegal contract. The court said:

“The cases cited go upon the theory that such a contract is against public policy, for the reason that the statutes provide a tribunal whose duty it is to supervise the settlement of the estates of all deceased persons, and whose special duty it is to protect the interest of minor children and heirs. No contract can be made respecting the assets of a deceased person’s estate, except by the authority and with the approval of the probate court. The law

fixes the manner of administration; it imposes certain restrictions upon the sale of the assets of the state. No person interested in the estate can by contract, assent or silence create other methods of selling the assets of the estate than those prescribed by the law."

The argument in this case is absolutely applicable to the case at bar. The Act of 1908 provides a tribunal that shall have the supervision of the estates of minors, which is, that they shall be subject to the jurisdiction of the probate courts of this state, and this Act has been construed by this court as putting a positive restriction upon the lands and providing a tribunal through which only they can be sold. And it is more clearly a matter of public policy that the statute should be enforced and rigidly construed, for the benefit of the Indian minor, than that the policy of the laws of administration should be so construed when the contract that contravenes them is made by *persons sui juris*. The Kansas Court sustains its position by the case of *Ravenscraft v. Pratt*, 22 Kan. 20, and by *Specht v. Collins*, 16 S. W. 934, from the Supreme Court of Texas.

In *Gray v. Hook*, 4 N. Y. 449, the Supreme Court of New York held that a contract entered into for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract, is void, and this although the contract is not declared void by statute, but is void only as a mat-

ter of public policy, as where two persons are applicants for appointment to office, and one agrees to withdraw his application in consideration of a division of the fees, and in this case, there was a new, valid, subsequent consideration, but the subsequent contract was founded in part upon the illegal contract.

In *Morrison v. Bennett*, 52 Pac. 553, the Supreme Court of Montana discussed the question of ratification and validity of contracts founded on a former illegal contract, and quoting from the last decided case, says:

“The distinction between a void and valid new contract in relation to the subject matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract.”

In *Tandy v. Elmore-Cooper Live Stock Com. Co.*, 87 S. W. 614, the court held that a note given in payment for pasturing of cattle on land enclosed in violation of the Act of Congress prohibiting the maintenance of any fence enclosing more than 160 acres of public domain, was void and that a guaranty thereof was void though the guaranty was given to secure the possession of the property, where the matter had been arbitrated, fixing the amount of the note, after full consideration had been received in the pasturing of the cattle.

In *Reummeli v. Cravens*, 74 Pac. 908, the Supreme Court of Oklahoma Territory holds that a contract by which one agrees to procure a license in his own name to sell intoxicating liquors, and to sell the liquors of another who is a non-resident of the State, as agent, is utterly void, and that an action of accounting cannot be maintained by the principal to recover monies which the agent had failed to account for, and which the agent had wrongfully embezzled. The court says that the intention of the parties was immaterial and that it was immaterial whether the contract was directly prohibited or arose collaterally out of a transaction prohibited by statute, and that contracts in violaion of law are void whether they are *mallum in se* or merely *malum prohibitum*, for the rule is extended to such as are calculated to affect the general interest and policy of the country.

So in *Arnett v. Wright*, 89 Pac. 116, the Supreme Court of Oklahoma Territory held that the sale and transfer of a city license to sell intoxicating liquors is prohibited by law, and that where a note is given, part of the consideration for which is the sale of such a license, the same is absolutely void, as is also any security given for such note.

In *Miller v. Ammon*, 145 U. S. 420, 36 L. Ed. 759, the Supreme Court of the United States says:

“It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be im-

plied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. When the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

This was held in a case of contract for the sale of liquors in violation of a city ordinance.

In *Church v. Proctor*, 66 Fed. 240, the Circuit Court of Appeals for the 1st Circuit laid down the rule that a contract as against public policy was void and no rights could arise out of the same, and this was held in a case where the contract was to supply a person who intended to violate the law with the supplies, and by the sale of them, although the person furnishing the supplies took no part in the illegal purpose and violated no statute.

In *McCanna and Fraser Co. v. Citizens Trust Co.*, 74 Fed. 597, it was held that where a foreign corporation has not complied with the provisions of the law making registration a condition precedent to transacting business, that it cannot recover upon a bond given by its agent given for the faithful performance of his duty.

In *Short v. Bullion-Beck & Champion Mining Co.*, 57 Pac. 720, the Supreme Court of Utah holds that where a person is employed in violation of the Eight-Hour law, he cannot recover either upon an

express or implied contract to pay for services beyond the limit of the eight hours day's work.

In *Elliott on Contracts*, section 19, page 22, the statement is made:

“A void contract is incapable of ratification in the true sense.”

In *Elliott on Contracts*, Sec. 648, the author says:

“Contracts prohibited by statute are, as a general rule, void, notwithstanding the statute does not expressly declare them to be so.”

And in Section 647, he says:

“A contract may be illegal even though it does not contravene the specific directions of a statute if it be opposed to the general policy and intent of the statutory law. The statutory prohibition may be either express or implied.”

And in Section 646, he states the rule:

“It is immaterial whether such agreement is forbidden by the Constitution of the United States, or of a state, by statutory enactment, state or federal, by a United States treaty, by the ordinance of a city, by the common law, or whether the thing forbidden is *malum in se* or *malum prohibitum*.”

In Sections 651, 652 and 1089 of the same writer, the rule is laid down that where the statutes indicate the policy of the law to be that a certain class

of acts shall not be done, or a certain class of contracts shall not be entered into, except upon certain conditions, as for instance, contracts and acts within the evil attempted to be corrected by the Interstate Commerce Law, are absolutely void and therefore not susceptible of ratification, and that all contracts in contravention of public policy, or that constitute a part of the evils that the statutes were enacted to correct, are absolutely void, and cannot be ratified.

It is to be noted that there is a distinction, and always has been a distinction as to contracts of infants being void or voidable, depending upon whether or not the statute undertook to regulate or prohibit them, and in all cases where a statute existed, either directly prohibiting the making of a contract or in general terms regulating it, a contract made without observance of the regulations, or against the prohibition, has been held void, and not susceptible of ratification, even though the statute did not expressly declare the contract void. A recent case of this character is *Hakes Investment Co. v. Lyons*, 137 Pac. 911.

This case is from the Supreme Court of California, and is founded upon their statute, identical with our own, which provides:

“A minor cannot give a delegation of power, nor, under the age of 18, make a contract relating to real property or any interest therein, or relating to any personal property not in his immediate possession or control.”



The court says that on account of the policy expressed in the statute, that a deed of a minor 14 years of age is absolutely void, and the land conveyed may be recovered 28 years later in an action for that purpose. The court says:

“As this deed was absolutely void, the doctrine of ratification has no application. The effect of ratification is to prevent the party from afterwards disaffirming the contract. This, of course, necessarily implies that but for the disaffirmance, the contract would be binding. Where the contract is not binding in any event, but is utterly void from the beginning, no ratification can make it valid. \* \* \* The deed being wholly void, it cannot of its own force operate as an estoppel, nor can the fact that it was duly recorded operate as an estoppel. Estoppel cannot validate a void deed.”

The same statute was in force in Dakota, and the Supreme Court there held in *Wambold v. Foote*, 2 N. W. 239, that a power of attorney given by a minor was absolutely void and that no rights could be acquired thereunder as distinguished from being merely voidable.

So in Connecticut the statute provided that no person under the government of a parent, guardian or master shall be capable to make any contract or bargain which in the law shall be accounted valid unless the said person be authorized or allowed so to contract or bargain by his or her parent,

guardian or master, in which case such parent, guardian or master shall be bound thereby. The Supreme Court of Connecticut in *Alsop v. Todd*, 2 Root 105, held that contracts of such minors were absolutely void, and of no effect, and reaffirmed the doctrine in *Rogers v. Hurd*, 4 Day 57, 4 Am. Dec. 182.

These cases are cited to show that where the law has undertaken to carry out the policy of restricting the control of his property by a minor that non-compliance with such restrictions renders his act of control absolutely void, as in violation of that public policy, and so in the case at bar, it has been decided repeatedly by the Oklahoma Supreme court, and the decisions affirmed by the United States Supreme Court, that the law did restrict the control of a minor Creek Indian over his allotments and forbade his leasing the same, and that it is therefore a matter of public policy, and contracts in violation thereof are absolutely void.

The court said in *Collins Investment Co. v. Beard*:

“These statutes show that Congress had the one fixed and permanent policy running through it, which was to safeguard and protect these Indians against their own improvidence,”

and in *Rogers v. Noel*, 34 Okla. 238, 124 Pac. 976, the court said:

“The deed being void when made by force of the statute, the rule of law applicable to voidable conveyances can have no application,”

and in *Tirey v. Darneal*, 133 Pac. 614, which case is expressly approved by the Supreme Court of the United States in *Truskett v. Closser*, this court said:

“If the deed was void, the rule of law urged by counsel for plaintiffs in error with reference to voidable contracts has no application.”

So with reference to contracts of a married woman. They are held to be absolutely void and not susceptible of ratification, because in contravention of the policy of the law. As said by the court in 1 Lansing 101:

“All there is consists of her promise to pay the debt of her husband in the form of a promissory note, made while he was living and cohabiting with her, and supporting his family, and her promise to pay such note after his death. The note when given was absolutely void, having no foundation either in law, equity, conscience or good morals, and a subsequent promise to pay such note was equally void.”

So in *McFarland v. Heim*, 127 Mo. 327, 48 Am. St. 629, the court held that a married woman is not capable of contracting unless the power is expressly given her by statute, and that a lease

granted by her, or by an agent appointed by her, was absolutely void, and that she could not ratify it.

So in *Nesbit v. Turner*, 155 Pa. St. 429, the court held that a bond of a married woman was absolutely void and a ratification after her discovery did not make the bond binding upon her. The court says:

“If, therefore, in 1873, when discovered, she simply acknowledged her signature, it was not sufficient to make her liable upon it.”

So it has universally been held that conveyances of homesteads by one spouse in whom the legal title rested was absolutely void in cases where the statute required both spouses to join in a conveyance.

These decisions all run upon the proposition of policy of the law being declared that the homestead should not be conveyed except by the joint consent and action of both spouses, and such statutes amount to just such a restriction upon the right of alienation as exists in the case at bar.

In *Burck v. Taylor*, 152 Fed. 632, 38 L. Ed. 649, the court says on page 649 of the official report:

“But it has never been doubted that as a general rule, a contract made in contravention of the statute is void, and cannot be enforced, and the only exception arises when from an examination of the statute, courts are able to

discern a different or limited purpose on the part of the law-makers."

In *Parke Davidson Co. v. Mullett*, 149 S. W. 461, the Supreme Court of Missouri laid down the rule:

"That a transaction of business in this state by a foreign corporation which has not complied with the conditions precedent prescribed by the Revised Statutes of 1909, is unlawful and contrary to the state policy and every contract in furtherance of such business is void and subsequent compliance with the statutes would not validate the contract."

The court held in *Howard v. Farrar*, 29 Okla. 490, 114 Pac. 695, that a conveyance of lands in violation of the restrictions imposed by Congress was void, and that a note executed by the Indian to purchase for the purpose of indemnifying him against the loss in the event that the grantor failed to convey the said land after the restrictions are removed is also void, and recovery thereon cannot be had, though the purchaser paid the purchase price of the land at the time of the agreement and sale, and the court said:

"Courts as a general rule will not aid a party to enforce an agreement made in furtherance of objects forbidden by law, or the general policy of the state, or to recover damages for a breach, or when the agreement has been executed by the payment of money to recover it back,"

and the restrictions on the land in that case were not as broad as in the case at bar, if the word "Absolutely" in the statute under consideration is to be given any force, for the restriction there reads:

"That all contracts looking to the sale or incumbrance in any way of land of an allottee, except the sale heretofore provided, shall be null and void."

In *Lingle v. Snyder*, 160 Fed. 627, the Circuit Court of Appeals of this circuit held that a contract that contravened the settled public policy of the state or nation is void, and no right of action can be predicated upon it, and this was held in a case where the law did not declare such contracts void, but only forbade enclosing of the public domain, and the contract was one for pasturing on enclosures on the public domain.

In *Standard Fashion Co. v. Grant*, 81 S. E. 606, the Supreme Court of North Carolina holds void a contract entered into without the state by which the purchaser agreed not to handle the goods of a competitor, it being the policy of that state as provided by statute that sales upon such conditions are not permitted.

And so in *McNeill v. Durham & C. R. Co.*, 47 S. E. 765, the Supreme Court of North Carolina holds that because giving of free transportation is contrary to the law, that a person riding upon a pass is in fact a passenger and the conditions of

the pass bind neither him nor the railroad company.

So in *United States v. Deitrich*, 126 Fed. 671, the court in considering a contract affected by an Act of Congress which provides:

“All contracts or agreements made in violation of this section shall be void,”

held that a contract lawful in its inception was avoided by such a statute and that the word “void,” while susceptible of different meanings, is obviously used in the sense of null and of no effect from the beginning, and not admitting of ratification.

So in *Cumberland Telephone and T. Co. v. City of Evansville*, 127 Fed. 187, the court held that a contract which is illegal as contrary to public policy is absolutely void, and may be attacked by anyone, and in any proceeding in which it is sought to found rights thereon.

This was held in a case where the public policy contravened by the sale complained of disabled the Telephone Company from performing its public duties and franchises.

In *Bass v. Smith*, 12 Okla. 485, 71 Pac. 628, the Supreme Court of Oklahoma, speaking by Mr. Justice Hainer, held that no rights could arise out of a contract to convey the lands to be acquired under the homestead law. This decision is supported by



numerous citations of authorities.

In *St. Louis Fair Association v. Carmody*, 151 Mo. 556, the Supreme Court held that a contract whereby an association sells the privilege furnishing cigars and liquors and other refreshments in and about its grandstand, where the grandstand was maintained in connection with a race track scheme of which gambling booths constituted part, was against public policy and was invalid because the statute forbade the maintenance of gambling booths.

In *Westerlind v. Black Bean Mining Co.*, 203 Fed. 599, the Circuit Court of Appeals of the 8th Circuit, in considering the Colorado statute providing that mortgaging or incumbering the general properties of a mining corporation should be void without it was ratified by the stockholders, says:

“An act or contract declared to be void by statute which is *malum in se* or against public policy, is generally utterly void, and incapable of ratification,”

and that therefore the fact that the stockholders seeking to avoid a lease given without the ratification of the stockholders, but which the petitioning stockholders voted to ratify, was so void that such stockholders were not by their vote estopped to assert the invalidity of the lease.

The court further says:

“Words and phrases should be given their popular sense and meaning unless there is a clear indication that they were used in a different sense. The popular sense of a word or phrase is that sense which people conversant with the subject matter with which the statute is dealing would attribute to it. The legal presumption is that words and phrases in a statute are used in their usual and customary sense unless it clearly appears that the Legislature intended to use them in a more restricted or different sense.”

Certainly it must be considered that the popular idea of the phrase “absolutely null and void” is that the subject to which it applied has no force or effect whatever.

In *Hardy et al. v. Samuels et al.*, 122 S. W. 654, the Supreme Court of Arkansas holds that an agreement by one to enter under the laws of United States, lands for homestead for the benefit of another, is against public policy and utterly void.

In *Calfflin v. Boorum*, 25 N. E. 360, the Court of Appeals of New York holds that a note payable to the maker's own order and by him placed with a broker to be disposed of for the maker's benefit, is usurious when sold at a discount which amounts to more than the legal interest and is void under the statute declaring all bills, notes and other obligations on which more than the legal rate of interest is taken or reserved, to be void, and further holds that such note is not validated by passing into the

hands of an innocent purchaser for value. The court says:

“A note void in its inception continues void forever, whatever its subsequent history may be. It is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given it by sale or exchange, because that which the statute has declared void cannot be made valid by passing through the channels of trade. Even the principle of estoppel does not render such note valid.”

For further authorities that the plaintiff was incapable of making any valid contract with reference to these lands, see:

*Belle v. Cook*, 192 Fed. 597;

*Yarbrough v. Spaulding*, 31 Okla. 806, 123 Pac. 843;

*Kirkpatrick v. Burgess*, 29 Okla. 121, 116 Pac. 764;

*Alfrey v. Colbert*, 104 S. W. 639;

*Colbert v. Alfrey*, 168 Fed. 231;

*Barnes v. Stonebraker*, 28 Okla. 75, 113 Pac. 903;

*Sharp v. Lancaster*, 23 Okla. 349, 100 Pac. 578;

*Eldred v. Okmulgee L. & T. Co.*, 22 Okla. 742, 98 Pac. 929;

*Williams v. Steinmetz*, 16 Okla. 104, 82 Pac. 986;

*Simmons v. Whittington*, 37 Okla. 356, 112 Pac. 1018;

*U. S. F. & G. Co. v. Hansen*, 129 Pac. 60;

*Dood v. Cook*, 137 Pac. 348;

*Campbell v. Mosley*, 38 Okla. 374, 132 Pac. 1098;

*Freeman v. First National Bank*, 143 Pac. 1165;

*Reid v. Taylor*, 144 Pac. 589;

*United States v. Leslie*, 167 Fed. 670.

In each and every one of these cases the courts have held that conveyances of restricted lands are void, and in a great number of them and in each of them in which there has been occasion to distinguish between void and voidable contracts, they have held the conveyances absolutely void, and not susceptible of ratification. It would seem, therefore, that there is absolutely no basis for the contention in this case that there could have been a ratification of the void instrument, particularly as the ratification relied on, to-wit, the contract of February 8, 1911, which contains no operative words of conveyance, but is founded on the former transaction, and simply provided for the operating of the lease and divisions of the proceeds under the original lease, was itself made four months before Gilcrease became of age, as shown by the rolls, and as said by the Supreme Court of Indiana in *Brown v. First National Bank*, 37 N. E. 158:

“The fact that a party to a contract which is void as against public policy has received the benefit therefrom, does not estop him.”

Cases may be cited indefinitely to the effect that contracts forbidden by statute are void, or contracts against public policy of the government either state or national, in respect to any material proposition upon which they have seen fit to legislate, are equally void, and this applies whether the statutes are penal in character, containing no express declaration of the invalidity of contracts or acts in violation thereof, or whether it simply prohibits the act, prohibits the acts or contracts to which the contested contract is merely incidental, and it applies equally where the policy of the government is only implied and not express. We have cited cases of all classes, but have limited our citations to only a portion of those in which some question of ratification was involved, and we have cited so many authorities not to enlignen the court upon the law so much as to show the court how uniform holdings are upon this proposition.

The principal case relied upon by counsel for defendant in the court below is the case of *United States v. Wright*, 197 Fed. 297, which is founded upon the case of *United States v. Noble*, 197 Fed. 292, and from both which decisions Judge Adams dissented, and as to the substance of which, namely, that overlapping leases for a limited period as allowed by the United States statute, were not void,

has been overruled by the United States Supreme Court. This decision, however, in addition holds that:

“Where an Indian minor, after reaching majority, redated, re-executed and extended a mining lease upon his allotment, the government had no right to sue to set it aside,”

but it is to be noted in that case that a mere ratification or reaffirmance was not had, but that subsequent to attaining majority, the Indian executed and acknowledged that:

“The foregoing lease is this day re-dated, re-executed and extended 10 years from the date hereof,”

and that he did this three consecutive times. It is well to note that the terms ratify or confirm or adopt are not used, but the terms were “re-dated and re-executed,” that is to say, executed again, and the same is not merely an adoption or ratification of the original lease, but simply the adoption of its terms in a contract then executed.

## IN CONCLUSION

While it may be true that this Court cannot consider the equities of this case as a basis for reversal, it can consider the evil here presented as being the evil Congress was aiming to correct by the Act under consideration.

Here was an Indian minor who was possessed of a valuable oil lease with more than forty wells producing thousands of barrels of oil monthly, who in two deals with his attorney, his guardian and his banker, comes out with them owning nine-sixteenths of that property, Thirty Thousand Dollars of his other property, and money for which they are not out a dollar and for which he has nothing to show.

In this state of facts and believing that grievous error has been made, we may be excused for having multiplied authorities upon propositions this Court may consider elementary and for extending this brief in discussion of fundamentals, but we know that the distinction between void and voidable acts with the principles upon which that distinction rests, as well as the inaccurate use of the word "void" is a continuous source of litigation, and difficulty for the courts, and it is with a view of illustrating our contention, rather than furnishing information to the court that we have gone to the extent we have in that matter, as well as in the dis-



cussion of "conclusive evidence" and the effect and nature of Statutes making one fact conclusive evidence of an issue.

In the trial court petitioner was unsuccessful upon the theory that he had ratified a contract voidable because of minority. In the Supreme Court that doctrine was repudiated, but the case affirmed upon the theory that the enrollment record did not show his age and was not conclusive of it. Neither of these theories has ever met the approval of the bar, nor been acquiesced in by the profession, and both destroy all the good aimed at by the Act of Congress and intensify all the evils sought to be removed. Under these conditions we could do no less than we have and can only wish we might do more.

Respectfully,

A. J. BIDDISON,  
*Attorney for Petitioner.*

**RESPONDENT'S**

**BRIEF**

In the  
Supreme Court of the United States

THOMAS GILCHESSE, - - - Petitioner,

vs.

G. R. McCULLOUGH, H. B. MARTIN,  
A. E. BRADSHAW and AL BROWN,  
- - - - - Respondents.

No. 167.

CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF OKLAHOMA

BRIEF ON BEHALF OF RESPONDENTS

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In the  
Supreme Court of the United States

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THOMAS GILCREASE, - - - <i>Petitioner,</i>	}	No. 167.
vs.		
G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW and AL BROWN,		
- - - - - <i>Respondents.</i>		

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CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF OKLAHOMA

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BRIEF ON BEHALF OF RESPONDENTS

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Statement of Case

This action was commenced by Thomas Gilcrease against G. R. McCullough, H. B. Martin, A. E. Bradshaw and Al Brown, in the District Court of Tulsa County, Oklahoma, on the 14th day of February, 1912, by filing his petition in said court on said day and procuring summons thereon to be issued against and served on the defendants in said cause, which petition appears on page 2 to page 27 of the printed record.

The allegations of the petition, in short, are that Thomas Gilcrease was a citizen of the Creek, or Muskogee, Tribe or Nation of Indians, of one-eighth degree of Indian blood, and was enrolled under Roll No. 1505, and, as such citizen, was entitled to receive and had received an allotment of the lands of said tribe, for which he received two patents or allotment deeds—one being for what is known as the "surplus" allotment and one for the "homestead" allotment, the surplus allotment being the South Half of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter of Section Twenty-two (22), Township Seventeen (17) North, Range Twelve (12) East, and the homestead allotment being the Northwest Quarter of the Southwest Quarter of said section, township and range; and that patents or allotment deeds to said land had been issued and approved by the Secretary of the Interior in the year 1902.

It was alleged that the defendants in said action were business men of mature judgment, were friends and business associates; that the plaintiff, at the time of making of certain of the instruments set out in the petition, was a minor in fact and a minor as shown by the enrollment records of the Commissioner of the Five Civilized Tribes, and was without business experience, and, while he was an adult in fact at the time of the execution of some of the instruments set out in the petition, as to such instruments he was a minor as shown by such en-



willment records. The petition further alleges that confidential relations existed between him and certain of the defendants at the date of the execution of the instruments set out in the petition and during the transactions impeached; that the defendant, H. B. Martin, was his attorney and the defendant, A. E. Bradshaw, was his guardian, and that G. R. McCullough, H. B. Martin and A. E. Bradshaw and Al Brown entered into a conspiracy to defraud him of his land or the oil and gas mining rights therein, and, in pursuance of said conspiracy, procured the execution by Gilcrease of the oil and gas mining lease to G. R. McCullough, dated August 24, 1909, and appearing on page 18 to page 20 of the Record; and, also, as a part of said conspiracy, procured the execution of the contract dated the 8th day of February, 1911, between Thomas Gilcrease, G. R. McCullough and H. B. Martin, appearing on page 23 to page 25 of the Record, by which Gilcrease was to receive an eighth royalty on all oil produced on the premises and G. R. McCullough, subject to said royalty interest, should have a one-half interest in the oil and gas mining leasehold in said land, and the defendant, Martin, should have a fourth interest in the leasehold, and Thomas Gilcrease, in addition to the one-eighth royalty, should have a fourth interest in the leasehold, and providing for the operation of the land for oil and gas mining purposes.

The instruments above mentioned and other in-

struments attacked in the petition as a part of the scheme to defraud were all attacked on the ground of fraud in fact, by which the defendants in said suit entered into a conspiracy for the purpose of securing an oil and gas mining leasehold on said land from Thomas Gilcrease by reason of the influence of Martin, as his attorney, and Bradshaw, as his guardian, over him, for a consideration greatly less than the value of such a lease. The conveyances were also attacked and sought to be set aside on the ground of the confidential relations alleged to exist between Gilcrease, Martin and Bradshaw. They were also sought to be set aside on the ground that, at the time of their execution, Gilcrease was a minor as shown by the enrollment records of the Commissioner of the Five Civilized Tribes.

The case came on for trial on the petition, the answers of the defendants thereto, and the reply of the plaintiff to such answers. On the trial of the case, it appeared that Thomas Gilcrease was born on the 8th day of February, 1890, and, consequently, was of age in fact on the 8th day of February, 1911. (Record, p. 106, marg. no. 362.) It also appeared that he was married, had been in business, and had had his guardian discharged, and that he was desirous of testing the legal question as to whether his marriage made him of age so he could sell and dispose of his property, and, considering that he was competent to transact his busi-

ness, had the District Court of Wagoner County remove his disabilities of nonage, and made a deed of the property to his mother for the purpose of having a suit brought to determine his legal capacity to convey his lands. The deed of Thomas Gilcrease to his mother, executed for the purpose of testing his legal capacity to convey his lands, and the order removing his disabilities of nonage were entered into and had before he was acquainted with any of the defendants in said suit, although, in his sworn reply, in paragraph 4 thereof, page 60, of the printed record, he says that said proceedings were had on the advice and under the direction of H. B. Martin, and in full reliance upon said H. B. Martin as to the validity of the proceeding and as to its being to his best interest and advantage.

On the trial, it appeared that, on the 22d day of October, 1910, McCullough assigned to Thomas Gilcrease a fourth interest in the oil and gas mining lease of the 24th day of August, 1909. (Record, p. 97, marg. p. 303.) And, at said time, G. R. McCullough executed to H. B. Martin an assignment of a like interest. On the 8th day of February, 1911, when Thomas Gilcrease was in fact of age, Martin and Gilcrease and McCullough entered into an instrument called a "contract," which is in effect an oil and gas mining lease, and was held to be such both by the trial court and the Supreme Court, by the terms of which Thomas Gilcrease was

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to receive an eighth royalty, to have a fourth interest in the oil produced, and Martin was to have a fourth interest in the oil produced, and McCullough, a half interest in the oil produced, after the paying of the royalty interest, and each of the parties was to pay his proportionate part of the expense of development, but no part of the one-eighth royalty secured to Gilcrease by such instrument was to be liable for any part of the development of the land. This contract is found at pages 99-100 of the Record. After the land had been developed for oil and gas mining purposes, and a large amount of oil produced therefrom, Martin assigned to Gilcrease three-fourths of his interest in the land. This instrument is dated the 11th day of December, 1911, when Gilcrease was of age in fact and also, as he contends, of age as shown by the record. This instrument is found at page 98 of the Record, marg. p. 307. The consideration of this assignment was certain moneys owed by Martin to Gilcrease, and certain real and personal property. The value of the property transferred to Martin by Gilcrease, including the debts liquidated, was the value of the interest in the lease assigned by Martin to Gilcrease, each being of the agreed value of \$31,000.00.

On the trial of the cause for the purpose of showing that he was not of age as shown by the records, Gilcrease offered in evidence what is known as the "roll card." This card appears on page 107

of the Record, marg. no. 550, and shows that Gilcrease is nine years of age, but does not show or pretend to show at what time he was nine years of age. The certificate of the Commissioner of the Five Civilized Tribes, however, states that he was enrolled as of June 9, 1899. To further prove that he was not of age as shown by the rolls at the time of making the oil and gas mining leases of August 24, 1909, and of the 8th day of February, 1911, he offered in evidence what is called the "census card," from which it appears that Thomas Gilcrease was nine years of age, but does not show when he became nine years of age, nor does it give the date of his birth, nor does it show when he was enrolled, save that it shows he was enrolled by the Colbert Commission September 1, 1896. There appears in the lower right hand corner of the card the word and figures "June 9/99," which card is certified to as being a correct copy of the enrollment records so far as they appertain to the enrollment of Thomas Gilcrease. This certificate is found inserted between pages 108 and 109 of the printed record.

On the trial of the case, it further appeared that Bradshaw had never been the guardian of Thomas Gilcrease—that is, his general guardian—but that, after Thomas Gilcrease was in fact twenty-one years of age, and after he was married and had a family, and after he had been relieved of the disabilities of nonage by the District Court of



Wagoner County, in order to take down certain moneys belonging to Thomas Gilcrease in the possession of the United States Indian Superintendent, at Muskogee, without resorting to litigation, Bradshaw was appointed special guardian under the Statutes of Oklahoma for the purpose of collecting such money and turning it over to Gilcrease; that he collected said money and turned it over in accordance with his appointment, and performed no other act thereunder.

On the trial of the cause, the District Court of Tulsa County found against the plaintiff on the issue of fraud in fact, found against the plaintiff on the issue of fraud in law implied from the alleged confidential relations existing between the plaintiff and the defendants, or any one of them, and found against the plaintiff as to the lease of August 24, 1909, and the lease of February 8, 1911, being void under the Act of May 27, 1908, holding that, if said leases were in contravention of said Act and could be set aside, the plaintiff, after he became of age in fact and at a date when he would be of age according to the enrollment record as interpreted by the plaintiff, had adopted and ratified such agreements.

An appeal was taken by Thomas Gilcrease to the Supreme Court of Oklahoma; that court holding that the roll card hereinbefore mentioned was correctly admitted in evidence for the purpose of showing the degree of Gilcrease's blood, but that

the certificate of the Commissioner was not evidence as to the date of enrollment. (Opinion of Court, Printed Record, p. 113.) The court further held that the enrollment card or record did not show when Thomas Gilcrease was enrolled, and there was no evidence to show that the date of June 9/99, in the lower right hand corner thereof, was the date of such enrollment, and that it could not take judicial knowledge of what was intended by such words and figures. (Opinion of Court, Printed Record, pp. 112, 113.) The Supreme Court also held that there was no evidence of fraud in the procurement of the instruments of sale. (Opinion of Court, Printed Record, pp. 114-118.) The court further held that plaintiff was of age February 8, 1911, when the second lease was made, and that said lease was valid, and upheld the same, and affirmed the judgment of the trial court. The court further found that there was no evidence sustaining the allegations of conspiracy, and that Mr. Martin never knew of and took no part in the negotiations leading up to the execution of the oil and gas mining lease, and was only consulted in reference thereto by Gilcrease after the making of the lease, when he was requested to prepare a lease to conform with the agreement.

From this judgment of the Supreme Court, affirming the judgment of the District Court of Tulsa County, Oklahoma, the plaintiff, Thomas Gilcrease, has procured a writ of certiorari to the



Supreme Court of Oklahoma, and the cause is brought here for the purpose of reviewing alleged errors in the construction of the Act of Congress of May 27, 1908.

The propositions of law arising on this record, we think, may be fully discussed and presented under the following heads:

### Propositions of Law

1. Section 3, of the Act of May 27, 1908, (35 Stat. L. 312) declaring the enrollment records of the Commission to the Five Civilized Tribes to be conclusive evidence of the age of Indian and Freedmen members of such tribes, means age as disclosed by such records, and not that the date of enrollment shall be taken as the day on which members of such tribe arrive at the exact age in years shown by such records, and so making date of enrollment an exact legal equivalent of date of birth.

2. The construction given to Section 3, of the Act of May 27, 1908, by the Circuit Court of Appeals of the Eighth Circuit, in *McDaniel v. Holland*, 230 Fed. 945, approved by that court in *Etchen et al. v. Cheney et al.*, 235 Fed. 104, and followed by the Supreme Court of Oklahoma in many cases, and followed, also, by state and federal trial courts in Oklahoma, not being patently opposed to the language of the Act, and having become the criterion by which the age of the mem-

bers of the Five Civilized Tribes is ascertained and the validity of deeds, attacked on the ground of minority, is determined, should be regarded as establishing a rule of property in Oklahoma and followed by this court.

3. The Act of May 27, 1908, removing all restrictions on all allotted lands of citizens of the Five Civilized Tribes not of Indian blood, and all citizens by blood of the said tribes of less than half blood, including minors, should not be construed as reimposing restrictions or creating restrictions on such classes not theretofore existing, and, thus, making the Act defeat its declared purpose.

4. That acts are spoken of in statutes and judicial decisions as being void does not necessarily mean such acts are void in the technical meaning of such term, but, more often, means the acts prohibited and declared void are voidable, as acts are rarely, if ever, void in the full technical significance of such term.

5. Conceding that the lease of August 24, 1909, was void and, also, the lease of February 8, 1911, they were susceptible of adoption or ratification, and, in fact, were adopted, ratified and confirmed, and, such being the fact, this cause should be affirmed, although this court may be of the opinion that the construction given the Act of May 27, 1908, by the Supreme Court of Oklahoma is erroneous. And of these, in their order.

I.

Section 3 of the Act of May 27, 1908, (35 Stat. L. 312) declaring the enrollment records of the Commission to the Five Civilized Tribes to be conclusive evidence of the age of Indian and Freedmen members of such tribes, means age as disclosed by such records, and not that the date of enrollment shall be taken as the day on which members of such tribe arrive at the exact age in years shown by such record, and so making date of enrollment an exact legal equivalent of date of birth.

It being conceded that Gilcrease was in fact of age February 8, 1911, and the trial court and the Supreme Court of Oklahoma having found that there was no evidence to support the allegations of actual and implied fraud, these questions are eliminated from consideration, and the case, of necessity, depends upon the fact whether Gilcrease, though of age in fact, was a minor as shown by the enrollment records, and, consequently, a minor within the purview of the Act of May 27, 1908; and the Oklahoma court having determined that there was no evidence in the case showing the date of Gilcrease's enrollment, it seems to us that but two questions can arise under the construction of such act: (a) Whether the enrollment record does disclose the age of Gilcrease within the purview of such act; (b) whether the Act of May 27, 1908, instead of removing restrictions, imposes restrictions, and a citizen of the Five Civilized Tribes cannot sell lands allotted to him until he appears

by the enrollment records to be of age. The first of these propositions will be discussed under this head of our brief, and the remaining one will be left for discussion under subsequent appropriate heads.

It is a general doctrine of the law—and one that, so far as we are advised, is without exception—that, when a deed or other instrument is attacked on the ground of minority, the instrument is presumed to be valid and binding until the fact of minority is established, and the burden of establishing such fact is on the minor or other person attacking the instrument. This general doctrine is well recognized and established in the State of Oklahoma and has been without exception applied to deeds and other instruments executed by citizens of the Five Civilized Tribes when attacked on ground of minority. Of the numerous cases so holding, we cite but two of the more recent cases.

In *Rice v. Ruble*, 39 Okla. 51, 134 Pac. 49, the court say:

“Where a grantor of land seeks to disaffirm her deed and recover the land on the ground that she was a minor when it was executed, she has the burden of proving minority as alleged.”

In *Sharshontay v. Hicks et al.*, 166 Pac. 881, not yet officially reported, the Supreme Court say:

“In the case of *Rice v. Ruble*, 39 Okla. 51, 134 Pac. 49, the court said: ‘Where a grantor

of land seeks to disaffirm her deed and recover the land on the ground that she was a minor when it was executed, she has the burden of proving minority as alleged.' This principle of law is well established by this court and we cannot say that the court erred in its findings of fact and the judgment rendered thereon."

When we come to consider the Act of May 27, 1908, and construing the same, we must do so in the light of this general doctrine of the law and assume that Congress was familiar with it and passed the Act of May 27th, with such knowledge and with the knowledge that such Act would be construed by the courts in the light of such doctrine.

Coming now to the Act of May 27, 1908, 35 Stat. L. 312, the part of the Act that bears upon the subject under consideration is that portion of Section 3, which is as follows:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribe and of no other persons to determine questions arising under this Act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

It is at once evident from the most casual perusal of Section 3 that Congress assumed that the approved rolls and the enrollment records of the



Commissioner to the Five Civilized Tribes disclosed the age of members of such tribes and the quantum of blood of the Indian citizens thereof, and further that it is the quantum of blood and the age as disclosed by such rolls and enrollment records of which such records are made conclusive evidence. The Act does not declare that the members of said tribes shall be assumed to be of the age shown by such records on the date of enrollment; such records are made conclusive evidence of age and this of necessity means that the age of such citizens and members as disclosed by such records shall not be open to dispute. It must of necessity further follow, that if such records do not disclose the age and degree of blood of such members or citizens they cannot be conclusive evidence of their age and degree of blood as no record can be made by *legislative declaration evidence of a thing it does not contain* except as it may be evidence of a precedent fact or act.

The question then arises whether the enrollment records introduced by Gilcrease disclose his age. The only evidence introduced by Gilcrease to sustain his contention that he was not of age as shown by the enrollment records was what is known as the roll card found on the lower part of page 92 of the printed record—this is a portion of the rolls of citizenship and of freedmen approved by the Secretary of the Interior and made by Section 3 of the Act of May 27, 1908, conclusive evidence as

to his degree of blood, but in no manner evidences his age, the same roll card is again found about the middle of page 107 of the printed record—and the enrollment record commonly known as the census card marked, "Plfs. Ex. S", inserted between pages 108 and 109 of the printed record and also found in the opinion of the Supreme Court of Oklahoma inserted between pages 112 and 113 of the printed record.

These cards being the entire record evidence offered by Gilcrease to sustain his contention that he was a citizen by blood under the Act of May 27, and that he was not of age as shown by the enrollment record and such enrollment records being made by the Act conclusive evidence of age, it is to such enrollment records so introduced, commonly known as the census card to which we must refer for the ascertainment of his age. Take such enrollment record, scan it from end to end, consider it from any angle we desire and it is respectfully submitted that it is impossible to determine from such census card or enrollment record the exact age of Gilcrease on the 8th day of February, 1911, or at any date subsequent thereto. It is impossible to determine from such record the date of the application for the enrollment of Gilcrease except that it appears from an endorsement on the face thereof that his enrollment was approved by the Secretary of the Interior, 1902, and that a citizenship certificate was issued June 9, 1899, and



consequently he must have been enrolled on or before such date.

It should be borne in mind, however, that this enrollment record is declared by the Act of Congress to be evidence alone of one fact, that of age, but, for the purpose of the argument, assuming the endorsements on the face of the record are competent evidence of the facts appearing in such endorsements, the necessary conclusion must be that the application for enrollment was made prior to June 9th, 1899. For if such endorsements are to be treated as competent evidence of the facts they state, it appears that a citizenship certificate was issued June 9, 1899, but it does not appear to whom such citizenship certificate was issued, but assuming that such citizenship certificate was issued to each of the persons whose names appear on the enrollment record or census card and therefore to Thomas Gilcrease, it appears that the application of Gilcrease for enrollment must have been made prior to June 9, 1899, because, in the nature of things, the application for enrollment must have preceded the issuance of the citizenship certificate, and such are rarely, if ever, issued on the day of enrollment.

If the citizenship certificate must, in the nature of things, have been issued subsequent to the enrollment of Thomas Gilcrease, it follows that such record does not furnish any evidence as to when Gilcrease was enrolled and his age on enrollment. True it is, it appears from such record that Thomas

Gilcrease was nine years of age at some time, but when he was nine years of age does not appear. It also appears from such record that Thomas Gilcrease was admitted by the Colbert Citizenship Commission September 1, 1896. And who can tell from an inspection of such record whether the figure "9," appearing in the column headed "Age," is or is not intended to refer to his age at the time of such admission; or who can tell from an inspection of such record what date Thomas Gilcrease became nine years of age? Again we repeat, and repeat with emphasis, that no one can tell from an inspection of said record, without more, when, on what day, or in what year, Thomas Gilcrease would become 21 years of age.

It is the enrollment records that Congress makes the conclusive evidence of age; that is, the existing enrollment records, *not records aided by assumption and resting on supposition or eked out by judicial presumption*. Congress has made the records conclusive evidence of age on the assumption that such records disclose the fact of which they were made conclusive evidence. If the records fail to disclose the fact of which they are, by congressional declaration, the conclusive evidence, they are not and cannot be evidence of such fact. It is the same as if Congress had passed a law declaring the entries in family bibles should be conclusive evidence of age. If one family possessed no bible, and another possessed a bible but no entries show-

ing the age of particular members of the family, the purpose of Congress in making such bibles conclusive evidence would fail in the particular case, because, as to such fact, the record did not exist; so, as to the enrollment records in regard to a particular case, if such records do not show the age of an Indian—if such records do not furnish the data from which such age can be calculated—the purpose of the Act of Congress, in making such enrollment records conclusive evidence of age as to such particular Indian, fails, and, in order to ascertain the age of a particular Indian in such a case, we must, of necessity, resort to other evidence. And this is the established law in Oklahoma, and was the established law prior to the commencement of this litigation.

In *Jackson et al. v. McGilbray*, 46 Okla. 208, the Supreme Court of Oklahoma, speaking of a certified copy of the rolls in connection with the Act of May 27, 1908, say:

“No date appears in this record itself showing when it was compiled. The age of the allottee, Clarence McGilbray, is unquestionably shown therein to be 9 years at some time not stated. When was he 9 years old? When did he reach his majority? These dates, it is impossible to determine from the record itself.”

In *Jackson v. Lair*, 48 Okla. 269, the Supreme Court of Oklahoma was passing on an enrollment record under the Act of May 27, 1908, which disclosed that Minnie Landrum would be, according

to the rolls, 18 years old in the year 1908, but did not disclose at what time in that year she reached such age, and upheld deeds made by her in September, 1908, on the ground that the enrollment records did not show her to be a minor, and that the oral evidence did show her to be or was such that the trial court could conclude that she was of age at the date of the execution of the deed; and, in passing on the question, the court say:

"On the other hand, it is both clear from the language of said Act of May 27, 1908, and well established by the decided cases, that, in respect to the age of the plaintiff at the time she executed the conveyances that were made by her after July 27, 1908, when that act took effect, the said enrollment record was not only admissible but was conclusive as to her age as shown by it. *Gilbert v. Brown*, 144 Pac. 359. But that record did not show, nor tend to show, her precise age within the year 1908. It throws no light, whatever, upon the date within that year after which she became 18, and, therefore, capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by resource to other evidence than the record."

The court again says:

"The oral evidence showing, as the trial court found, that Minnie Landrum was 18 years old at the time she executed to plaintiff the deeds of 1908, plaintiff was clearly entitled to the equitable relief given him."

The rule laid down by the Oklahoma court must be the correct rule. There can be no other rule. To hold otherwise would be to hold that a citizen of the Five Civilized Tribes could not sell until he appeared to be of age by the enrollment records, which is an entirely different thing from holding the enrollment records to be conclusive evidence of age, or that a minor citizen of the tribe *could sell, notwithstanding a prohibition on such sale*, if the enrollment records did not disclose his age, and that oral evidence could not be introduced for the purpose of establishing minority, and, therefore, the invalidity of the deed. Either of such holdings, we submit, would be reading something into the Act of Congress which it does not contain, and would result in shocking our sense of right and justice.

It was contended by petitioner in his application for a rehearing in the Supreme Court of Oklahoma, as it is contended here that the word and figures "June 9/99," in the lower right hand corner of the enrollment record, give the date of application of enrollment of Thomas Gilcrease, and that, consequently, it follows that it should be held that such record shows that Thomas Gilcrease was nine years of age on June 9, 1899—thereby, in effect, making the day of the application of enrollment the legal equivalent to the anniversary of the date of birth of Thomas Gilcrease—and that we should construe the enrollment record as disclosing that



Gilcrease was exactly nine years of age June 9, 1899. It is evident such a conclusion cannot be arrived at from the face of the record itself, and it is only by supposing something that the record does not disclose that such conclusion can be arrived at.

Congress has made the enrollment records as they exist the conclusive evidence of age—not some suppositious record—not some record aided and assisted by what this court or someone else might determine should be read into the record, or what the record was supposed to, but does not in fact, disclose. Congress enacted that, on the production of the enrollment records *showing the age, such age should be conclusive*, and the matter of age put at rest thereby. It did not mean, if, in a particular case, the record failed to disclose the age, fictions, construction and supposition should be resorted to to eke out a deficient record for the purpose of giving effect to an Act of Congress or to a purpose Congress intended to declare in such act, but, in fact, did not declare.

The proposition seems to be that the word and figures "June 9/99", in the lower right hand corner of the record, mean that Thomas Gilcrease made application for enrollment on that day. There is nothing on the face of the record to show such to be the fact or tending to show it to be the fact. It is only by indulging in presumption and supposition that it can be determined such is the meaning of the words. It is suggested, however, we

must so hold in order to give effect to the Act of Congress. Why this is so, we are not told. Why, in order to carry out the intention of Congress, we should say such words and figures mean the date of the application for enrollment, and that the mother and her five children were on that day of the exact age shown in the column headed "Age," we are at a loss to determine; and how such holding would effectuate the purpose of Congress, we are at a loss to determine. It seems to us it would be *directly* to the contrary, for Congress has made *existing records conclusive evidence*. We would be making a *suppositional record*, and then saying the record thus made is the record meant by Congress. If the record does not show the age of an Indian, the purpose of the Act of Congress in making such enrollment records conclusive evidence as to such particular Indian, it is true, fails. That does not, however, CALL UPON COURTS TO MANUFACTURE, BY REASONING, A RECORD, and then apply the Act of Congress to the record so MANUFACTURED.

The Supreme Court of Oklahoma has held, and in our judgment correctly held, that it cannot take judicial knowledge of the meaning of such words and figures, and, unless this court holds it can take judicial knowledge of the meaning of such words and figures, and that such words and figures mean that Thomas Gilcrease made application for enrollment on June 9, 1899, there is no way in which it can arrive at such conclusion, for there is in the



record no evidence explaining such words and figures or showing for what they stand or were intended to stand. But, supposing that the court will take judicial knowledge of the meaning of such words and figures, and that such words and figures mean that Thomas Gilcrease made application for enrollment on June 9, 1899, that does not affect the case, for there is nothing in the Act which makes the date of the application for enrollment evidence of any fact; nor does it declare that the date of the application for enrollment shall be taken as the birthday of a citizen, or that the age as disclosed by the record shall be taken and held to be the exact age of a citizen or member of the tribes on the day of his application for enrollment.

We have said there is no evidence in the record showing or tending to show that June 9, 1899, was the date of the application of Thomas Gilcrease for enrollment, and this is entirely correct. However, it does appear in the printed record, from the certificate of J. G. Wright, Commissioner of the Five Civilized Tribes, certifying the roll card or approved rolls (on pages 921 and 107 of the printed record), that Thomas Gilcrease was enrolled as of June 9, 1899. Such statement is not evidence of such fact. The only purpose of such certificate is to identify the roll offered in evidence to show the degree of blood of Thomas Gilcrease, and is not evidence of any other fact. This clearly appears from the decision of the Supreme Court of Oklahoma in this particular cause, and from the case of

*Jackson v. McGilbray supra*, in which last case the authorities, or a great many of them, bearing on the office of such certificate, are given; indeed the roll card itself is made evidence *alone* of the quantum of blood; but, taking June 9, 1899, as the date of the enrollment of Thomas Gilcrease, and that the endorsement in the lower right hand corner of the census card (appearing between pages 108 and 109 of the printed record, and, again appearing between pages 112 and 113 of such record) should be given the same legal effect as if it read: "Date of Enrollment, June 9/99," how does this help petitioner or tend to show that the Supreme Court of Oklahoma committed error in construing or applying the Act of May 27, 1908? How would this affect such question in any aspect, save that of determining that Gilcrease was nine years of age on such date, and would, consequently, be 21 years of age June 9, 1911? How would it show or tend to show that Gilcrease was not 21 years of age February 8, 1911, unless we construe Section 3 of the Act of May 27, 1908, so as to make it read as follows:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes, and of no other persons, to determine questions arising under this act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen

or freedman, and the age shown by such records shall be conclusively presumed to be the exact age of such citizen or freedman on the day of his enrollment!"

It is submitted that, to so construe the Act, would be in effect to add to it a provision that Congress did not see fit to enact, and would be merely an arbitrary attempt on the part of the courts at judicial legislation.

It may be that Congress might have more effectively carried out its intention of providing a certain means of ascertaining the age of citizens and members of the Five Civilized Tribes if it had enacted Section 3 in the form above suggested. It is a sufficient answer, however, to this to say that Congress legislated in reference to the age of Indians, and, in reference to the enrollment records showing the age of such citizens and members—and therefore, presumed to be familiar, at least to some extent, with such records—did not so enact, but thought it wiser and better to take the age as in fact shown by such records, and not to establish an arbitrary and immutable method of ascertaining the age of such citizens and members, an arbitrary method that in the majority of cases could not, in the nature of things, be in accord with the fact. If we say that the endorsement in the lower right hand corner of such census card or enrollment record should be read or given the same legal effect as if it read: "Date of application for enroll-

ment," or "Date of enrollment, June 9, 1899," then, in such event, the exact question that would be raised by a record in such state has been passed on adversely to the contention of the petitioner, both by the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of the State of Oklahoma, prior to the determination of this case, and has been followed in numerous cases, and is now regarded as *the established law in Oklahoma, by a long line of adjudicated cases.*

-- In *McDaniel v. Holland*, 230 Fed. 945, a census card similar in all respects to the census card or enrollment record in evidence in this case was before the court, except that it was the enrollment record or census card showing the enrollment of Robert L. Holland. This census card, like the Gilcrease census card, had on it: "October 11, 1900," and showed that Robert L. Holland was nine years of age. It was also shown that, after the making of the record, the words "Date of application for enrollment" were added to such census card or enrollment record, immediately preceding the word "October," and it was further shown by the evidence in the cause that such date was in fact the date of the application for enrollment. The question before the Circuit Court of Appeals of the Eighth Circuit was whether such record showed Robert L. Holland was a minor on September 25, 1912, and continued to be such minor until October 11, 1912. The Circuit Court of Ap-

peals, after setting out the facts in the case and the census card, say:

“At the lower right-hand corner of the census card that was introduced in evidence by the plaintiff appear the following words and figures: ‘Date of application for enrollment, Oct. 11, 1900.’ It was shown by evidence introduced by the defendants that the words ‘Date of application for enrollment’ were placed upon the card before ‘Oct. 11, 1900,’ long after the census card had been made out, and that they were placed upon the card so that persons examining the record might know what the word and figures ‘Oct. 11, 1900,’ meant. It appeared from the evidence that the census card originally simply contained the word and figures, ‘Oct. 11, 1900.’ There is no question, however, but that the date mentioned was the date of the enrollment. The date of birth of the plaintiff did not appear from any evidence introduced unless the census card showed it. It appeared also from the evidence that the Paraffine Oil Company was in possession of the premises engaged in exploring and mining the same for oil and gas. Counsel for defendants offered evidence which they claim tended to contradict the finding of the Commission to the Five Civilized Tribes as to the age of the plaintiff, Robert Lee Holland. The several offers were denied, but as we view the case it is not necessary to consider the rulings of the court on said offers.”

The Circuit Court of Appeals then goes on to discuss the point raised by the defendants, that the



plaintiff had not capacity to maintain the suit, deciding the point adversely to the contention of the defendants. After so doing, it reverts to the claim of the plaintiff, that his deed was void on account of being executed when he was a minor as shown by the enrollment records, and the effect of such record or census card, and, in that connection, says:

"The right of the plaintiff to recover possession of the land in controversy is based upon the following claim: That the enrollment record shows the age of Robert Lee Holland to have been nine years at the date of enrollment, to-wit: October 11, 1900, and also that this date was his ninth birthday. Hence Holland would not arrive at the age of 21 years until October 11, 1912, therefore, his deed to McDaniel made on the 25th of September of that year is null and void under the act of Congress of May 27, 1908 (35 Stat. 312). The important question therefore is whether the evidence introduced at the trial showed the plaintiff, Robert Lee Holland, to have been less than 21 years of age when he executed and delivered the deed to McDaniel for the land in question, and not whether he was 9 years of age on October 11, the date of his enrollment."

The court then sets out that portion of Section 3 of the Act of May 27, 1908, quoted in this argument, and then proceeds:

"We may accept the record introduced as conclusive that the plaintiff was nine years of age at the date of the enrollment October 11,

1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the Commission that he was nine years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within one year prior to October 11, 1900, for after arriving at the age of nine years he would be 9 until he arrived at the age of 10, which would be a period of one year."

The court then proceeds to show how the basis of the claim of the plaintiff—that he must be considered as exactly nine years of age October 11, 1900, and that such date must be conclusively held to be the anniversary of the ninth birthday of the plaintiff—arose, and sets out certain correspondence of the Interior Department, from which it was claimed that the department so construed the Act of May 27, 1908, and that such construction amounted to a construction of the Act by the department of the government charged with its administration, and, therefore, should be followed by the court. From such correspondence, it appears that, in many cases, the exact age of the members and citizens of the Five Civilized Tribes was not given, but such ages were given in years. It further appears that persons seldom, on being asked their ages, give any age other than their age at the last birthday, and it is further said: "*The rule is so universal, in the opinion of the office, as to justify a holding that in all cases where the age of a minor is given by parents or relatives, the age*



*given relates to the last preceding birthday."* This statement is made by officers having charge of the enrollment of Indians and familiar with the facts pertaining to such enrollment and the customs and habits of the persons whom they enroll. Therefore, it would appear, where the date of birth is not given, that the age shown on the enrollment records or census cards is not the exact age of the person enrolled on the date of enrollment, but is the age of such person at his last preceding birthday and was so understood and intended by the Commission. For the purposes of administration, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that the Interior Department consider the age shown as the exact age of the Indian on the date of his application for enrollment, and that such date should be held to be the anniversary of the date of birth, except where the record otherwise showed. It further appears that this recommendation of the Commissioner was approved by the Secretary. The Circuit Court of Appeals then proceeds to dispose of the contention that this amounted to a construction of the Act, and, disposing of such contention, say:

"This recommendation of the Commissioner, approved by the Secretary, is claimed to be a construction of section 3 of the Act of May 27, 1908, (35 Stat. 312) by the department of the government having charge of the enforcement thereof, and as such to be entitled to great weight, but the clause reading, 'and that the

date of the application shall be held to be the anniversary of the date of birth except where the records show otherwise,' was not a construction of the statute, but was a plan adopted by the Land Department, 'for the purposes of the government' in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was nine years of age on October 11, 1900, the judgment of the Commission under the statute would be conclusive, but as we have before indicated that is not the question. The question here is, was the plaintiff a minor on September 25, 1912; that question the enrollment record introduced in evidence did not determine, and of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence."

This ruling of the Circuit Court of Appeals was followed by the same court in *Etchen v. Cheney*, 235 Fed. 104, and it says:

"The enrollment record introduced in evidence showed the date of the enrollment of Frank C. Elliott, an Indian, to be October 16, 1900, and his age at that time to be 10 years. On this evidence the trial court found that Elliott became 21 years of age October 16,

1911. The master found when the case was last before him that Elliott was born January 26, 1890, and reached his majority January 26, 1911. The finding of the master must stand, although it makes no material difference in this case which day is taken. We held in *McDaniel and Paraffine Oil Co. v. Robert L. Holland* (No. 4461), 230 Fed. 945, — C. C. A. —, that the date of enrollment, standing alone, was not evidence that a particular Indian was born on that day."

In *Heffner et al. v. Harmon*, 159 Pac. 650, not yet officially reported, the Supreme Court of Oklahoma say:

"It was incumbent upon the plaintiff below to establish by competent evidence that the allottee, Robert Ross, was a minor at the time he executed the oil and gas lease to Lula M. Heffner, on February 21, 1912. In an effort to do this he introduced the enrollment record of the Commissioner to the Five Civilized Tribes, and according thereto the said Robert Ross, the allottee, was enrolled as of 10 years of age on April 4th, 1901. The lower court held that Robert Ross became of age on April 4, 1912, and that the lease executed by him on February 21, 1912, was void for the reason that he was a minor at the time of its execution. We do not think that the lower court was justified in finding from this evidence here that Robert Ross arrived at his majority on the 4th of April, 1912, and not before."

The court then proceeds to quote from the case

of *McDaniel v. Holland*, *supra*, with approval, and then say:

"In the instant case the age of the allottee on February 21, 1912, was an important question to be determined. The date of the birth of Robert Ross was an open question to be decided by competent evidence. Under the record here, there was no competent evidence from which the trial court could determine that Robert Ross was not of age on February 21, 1912, the day upon which he executed the gas lease to Lula M. Heffner."

In Oklahoma, the head notes of a case, by statutory enactment, constitute the law of the case. And the first head note to the above case is as follows:

"Under Act May 27, 1908, c. 199, Sec. 3, 35 Stat. 313, providing that the enrollment records of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to the age of an enrolled citizen or freedman, the enrollment record, giving the age of an Indian as 9 years, is conclusive that on that date he had passed his ninth birthday and had not yet reached his tenth, but is not conclusive that he was exactly 9 years of age on that day, and does not establish that he was a minor when he made a conveyance of land one month less than 12 years thereafter."

The second head note is, as follows:

"A ruling of the Commissioner of the General Land Office that the department should

hold that the age of a citizen of the Five Civilized Tribes as given in the application for enrollment should be construed, for the purposes of the government, as representing the age of the applicant at that time, and that the date of the application should be held to be the anniversary of the date of the birth, except where the records show otherwise, was not a construction of Act May 27, 1908, c. 199, sec. 3, 35 Stat. 313, providing that the enrollment should be conclusive evidence as to the age of the Indian and entitled to weight as a construction by the department having charge of the enforcement of the act, but was merely an administrative plan, adopted for the purpose of the government, and does not render the enrollment showing the age only by years conclusive as to the date of birth, against a purchaser of land from the Indian."

In *Hart et al. v. West et al.*, 161 Pac. 534, not yet officially reported, the same question was again before the Supreme Court of Oklahoma, and it says:

"In the instant case the age of the allottee on December 17, 1900, was ten years, and the enrollment record did not show on what date prior to that time she became ten years of age.

The general rule, as stated by 13 Cyc. 738, is as follows: 'It is presumed that the grantor in a deed was competent to execute the same at the time of its execution, and the burden of proving incompetency is on the person alleging.'

In the case of *Jackson v. Lair*, 150 Pac. 162, it is said by Mr. Commissioner (now Justice) Thacker, in construing this statute:



'But that record did not show, nor tend to show, her precise age within the year 1900. It throws no light whatever upon the date, within that year, at which she became 18, and therefore capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by recourse to other evidence than the record'."

The court then quotes from the *McDaniel* case as follows:

"In the very recent case of *McDaniel v. Holland*, 230 Fed. 948, 145 C. C. A. 139, in a case identical in principle with the case at bar, it is said:

'We may accept the record introduced, as conclusive that the plaintiff was nine years of age at the date of the enrollment October 11, 1900; but this does not prove that he was a minor on September 25, 1912, as the finding by the commission that he was nine years of age on October 11, 1900, is entirely consistent with the fact that he had arrived at the age of 9 years at any time within one year prior to October 11, 1900, for after arriving at the age of nine years he would be nine until he arrived at the age of ten, which would be a period of one year.'

Then, after referring to the rule adopted by the General Land Office of holding the application date of the enrollment record as the anniversary of the allottee, that court concludes:

But the clause reading, 'and that the date of the application shall be held to be the anniversary of the date of birth except where the

records show otherwise,' was not a construction of the statute, but was a plan adopted by the Land Department, 'for the purposes of the government,' in the administration of the duties devolved upon it in connection with Indian lands. It may be conceded to have been a convenient plan for the purposes of the government, and no doubt as between the government and the Indian it was workable, but as against the defendants in this action it was, and is, a pure fiction, not supported by even a probability. If in this case the question was whether or not the plaintiff was nine years of age on October 11, 1900, the judgment of the commission under the statute would be conclusive; but, as we have before indicated, that is not the question. The question here is: Was the plaintiff a minor on September 25, 1912? That question the enrollment record introduced in evidence did not determine, and, of course, is not conclusive. The enrollment record introduced in evidence left the date of birth of the plaintiff an open question to be established by competent evidence.'

This court, in the very recent case of *Heffner v. Harmon*, 159 Pac. 650 (No. 7547), not yet officially reported, has also held, in a case identical with the case at bar, that the age of the allottee, where the date of birth is not shown by the enrollment record, may be shown by competent evidence."

In *Jordan v. Jordan et al.*, 162 Pac. 758, not yet officially reported, the Supreme Court of Oklahoma say:

"The certified copy of the enrollment records in the office of the Commissioner to the



Five Civilized Tribes, introduced in evidence at the trial, showed that John B. Jordan was nine years of age upon the 10th day of November, 1900, without disclosing his exact birthday and with no showing of the time at which he arrived at the age of nine years."

The court then, with the statement that the rule announced had been repeatedly followed by the Supreme Court of Oklahoma, cites and quotes from the case of *McDaniel v. Holland*, also citing Oklahoma cases, among which is *Gilcrease v. McCullough*, being the same case in which a writ of certiorari has been issued to the Supreme Court of Oklahoma, and then proceeds:

"The above cases lay down the principle that, where the enrollment record of an Indian purports to give his exact age, such record is conclusive, but that such record is not conclusive of facts which do not purport to be shown by it. The enrollment record introduced in evidence in this case did not purport to show the exact age, by day and month, of John B. Jordan, but only purported to show that he was nine years of age on November 10, 1900.

The question at issue was as to whether John B. Jordan was twenty-one years of age upon April 16, 1912; and the showing by the enrollment record that he was nine years of age on November 10, 1900, the record not purporting to show that November 10th was his birthday, would not be proof that he was not twenty-one years of age upon April 16, 1912."

In *Hutchinson v. Brown*, 167 Pac. 624, not yet officially reported, the question was again before the Supreme Court of Oklahoma, and the court say:

“When the deed from the allottee to Miller was proven, it then devolved upon the defendant to prove his contention of infancy of the allottee. This burden was recognized by the pleadings. Is this burden sustained by the proof that the allottee was enrolled as 7 years of age in August, 1898, the enrollment records being conclusive evidence of the age and not showing the exact birthday, there being no other proof tending to identify such birthday? We think not.”

In *Tyrell et al. v. Shaffer et al.*, 174 Pac. 1074, Supreme Court of Oklahoma, speaking of the Act of May 27, 1908, says:

“It is urged with great argumentative force that by the terms of this act of Congress it was intended to make the Indian roll conclusive as to date of births. With this contention, however, we do not agree. It is true the enrollment record is conclusive as to all matters contained within it. The roll in this particular case is conclusive that Bessie Tyrell was eight years old on the 27th day of November, 1899, but it is not conclusive as to the date of her birth. The roll is conclusive that she had arrived at the age of eight years at some period of time within one year preceding the 27th day of November, 1899, but it is not conclusive that November 27, 1899, was her birthday. The act was not intended to arbitrarily fix the date of birth and close the door to all proof regardless of the true facts,

unless the date of birth is stated in the enrollment record. The important question to be determined is whether the evidence on the trial showed Bessie Tyrell was not of age at the time she signed the first deed to Peterson, and not whether she was eight years old on the 27th day of November, 1899, and, the plainiffs alleging that she was a minor at that time, the burden was upon them to prove that fact."

In another place the court says:

"The conclusion reached in this opinion is abundantly supported, not only by the decisions of this court, but by the Circuit Court of Appeals, and is *no longer an open question in this jurisdiction.*" (Italics ours.)

In *Cushing v. McWaters et al.*, 175 Pac. 838, not yet officially reported, the Supreme Court of Oklahoma say:

"Sillin McWaters, the mortgagor, was a citizen by blood of the Choctaw Nation of Indians; and the only evidence offered to establish the allegation that she was a minor at the time she executed the mortgage was the enrollment record, which consists of a census card and the memorandum taken at the time the application for enrollment was made. The memorandum is: 'Date of application for enrollment, 8-9-99.' And the census card shows the mortgagor to have been six years old at the time of the enrollment. The trial court took the view that the memorandum on the census card, to-wit, 'Date of application for enrollment, 8-9-99,' established the birthday of the mortgagor as of August 9, 1899, and

inasmuch as her sixth birthday, by this memorandum, fell on August 9, 1899, she was 17 years old August 9, 1910, and consequently could not have been 18 years old on November 1, 1910, the date upon which she executed the mortgage in question. But in assuming that the memorandum on the census card, showing the date application was made for enrollment, fixed the date of the applicant's birth, the court erred; for the memorandum did not give, nor purport to give, the date of the applicant's birth, but only showed that the date upon which application for enrollment was made was August 9, 1899, and the census card further showed that at that time the applicant was 6 years old, or had passed her sixth birthday. But from anything that appears in that record, it could not be said that she was not 6 years and 11 months old at the time she made application for enrollment; for the record is silent as to when she became 6 years old, and only shows that she had passed her sixth birthday and had not yet reached her seventh, on August 9, 1899, the day upon which she was enrolled."

The court then reviews some of the Oklahoma cases on the same subject and says:

"It is true that, where the enrollment record purports to give the exact age of a citizen of the Five Civilized Tribes, such record is conclusive; but it is not conclusive of facts which are not shown by the record. And the enrollment record introduced in evidence in this case does not purport to give the exact age of the mortgagor, but only shows that she was

six and not yet seven years old August 9, 1899, which happened to be the date of her enrollment. And the burden was on the defendants, who alleged incapacity, to prove it; but the record introduced does not sustain the allegation."

In *Jackson et al. v. Lair*, 48 Okla. 269, 272, the court says:

"On the other hand, it is both clear from the language of said act of May 27, 1908, and well established by the decided cases that, in respect to the age of plaintiff at the time she executed the conveyances that were made by her after July 27, 1908, when that act took effect, the said enrollment record was not only admissible, but was conclusive as to her age as shown by it. *Gilbert v. Brown*, 44 Okla. 194, 144 Pac. 359. But that record did not show, nor tend to show, her precise age within the year 1908. It throws no light whatever upon the date, within that year, at which she became 18, and therefore capable of conveying. This question, unsettled by the enrollment record, must necessarily be determined by indulging a legal presumption or by recourse to other evidence than the record. Section 3 of said act, which is the one to be considered here, 'merely declares that all allottees who appear to be minors, as therein defined, upon the enrollment records, must hereafter be conclusively presumed to be such in all transactions concerning the alienation of their allotted lands' (*Scott v. Brakel et al.*, 43 Okla. 655, 143 Pac. 510); and it therefore does not



appear from the proffered and rejected evidence (the enrollment record) that Minnie Landrum was under the disability of minority at the times in 1908 at which she executed to plaintiff the several deeds of that year. The oral evidence showing, as the trial court found, that Minnie Landrum was 18 years old at the time she executed to plaintiff the deeds of 1908, plaintiff was clearly entitled to the equitable relief given him."

We think that the rule announced by the Circuit Court of Appeals of the Eighth Circuit, and subsequently followed by it and the Supreme Court of Oklahoma, is the correct rule, and the only rule that is consonant with justice and does not necessitate the resort to judicial legislation in the guise of construction, and that the reasons given by such courts are unanswerable.

Section 3 of the Act of May 27, 1908, makes the approved rolls of citizenship and of freedmen of the Five Civilized Tribes conclusive evidence as to the quantum of Indian blood of any such citizen or freedman. Now, in the event such approved rolls do not show the quantum of Indian blood, or do not show whether the enrolled citizen or member is or is not of Indian blood, shall we say that it conclusively appears from the record that he is not of Indian blood? The different Indian treaties and acts of Congress, in reference to the Five Civilized Tribes, generally provide that full-blood Indians and Indians of certain specified degrees of

blood cannot sell or dispose of their allotments or inherited lands without the approval of the Secretary of the Interior, the approval of the proper county court, or the removal of restrictions by the Secretary. An enrolled citizen who is an Indian of full blood, but whose quantum of blood is not shown by the enrollment record, makes a deed to his allotment or inherited land. Shall it be said that, because the Act of Congress makes such approved rolls conclusive evidence of the quantum of Indian blood, and, such approved rolls not showing such degree of blood, such full-blood Indian is conclusively presumed not to be of Indian blood, and, therefore, his deed is valid? Let it not be said that such a situation is not likely to arise, for it has in fact arisen more than once.

Section 19 of the Act of April 26, 1906, 34 Stat. L. 137, provides as follows:

"And for all purposes, the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior."

This provision is, of course, substantially identical with the provision of Section 3, of the Act of May 27, 1908, making the approved rolls conclusive evidence of the quantum of blood. One, Munnah, was a female Creek Indian of the full-blood. She was enrolled as a citizen by adoption of the Seminole Nation, and the enrollment record did not



show that she was of Indian blood, or give or pretend to give the quantum of such blood. She made a deed to her land, and an action was brought by the United States to set aside the deed, and, it appearing that the enrollment record did not show she was of Indian blood, a motion to dismiss the action was sustained. The United States appealed the case, and, in passing on the question, the Circuit Court of Appeals of the Eighth Circuit, in *United States v. Stigall*, 226 Fed. 190, say:

"It is conceded there were twenty persons on the Seminole roll by adoption, but it does not appear whether they were Indians of other tribes or to what race they belonged. What, therefore, does the entry of a name on the roll of Seminoles by blood, of one as a member of the tribe by adoption, indicate as to what race he belonged to? Absolutely nothing. The Dawes Commission, it is true, was a quasi-judicial body, but the entry upon a roll of the Seminoles by blood that a person became a part of the tribe by being adopted was no more an adjudication that he is one of the white race than that he is an Indian. We conclude that the judicial body, the Dawes Commission, never made any adjudication as to whether Munnah was a white woman or an Indian, and the case is reversed and remanded with instruction that the motion to dismiss should have been overruled, and to set aside the court's order to the contrary, and to give the appellee an opportunity to answer."

In *Lula et al. v. Powell*, 166 Pac. 1050, not yet

officially reported, the Supreme Court of Oklahoma, passing on the same question decided in the Stigall case, say:

“Since the rolls of citizens do not determine the question of Indian blood, we think it permissible to do so otherwise.”

It is difficult to understand how Section 3 of the Act of May 27, 1908, could be construed to permit the introduction of parole evidence to show the quantum of Indian blood, so as to defeat the execution of a deed, when the quantum of such blood did not appear from the approved rolls, and, at the same time, hold that parole evidence was not admissible to show the true age of an Indian for the purpose of sustaining a deed, when the true or exact age does not appear from the enrollment records. Therefore, we contend that the Circuit Court of Appeals and the Supreme Court of Oklahoma are exactly right and correct in holding that the approved rolls of citizenship and the enrollment records of the Commissioner to the Five Civilized Tribes are conclusive evidence only of the facts of which they are made conclusive, when such facts appear on or from the records; and, when such facts do not appear, such records and approved rolls are not and cannot be evidence of such facts, and that, in such event, it is open to prove the existence of such facts by any competent testimony. To hold otherwise would be to defeat the evident purpose and design of Congress, and

to permit *Indians to convey their lands and make valid conveyances thereof directly in the teeth of express congressional prohibition.*

Again, it is clearly apparent that Congress did not intend the enrollment records to furnish *two diverse methods of establishing age, or to divide allottees into two distinct classes whose ages would be established by different methods*, yet this, it seems to us, must be the result unless our argument be correct. The enrollment records, in some cases, do give the exact age of allottees by giving the day, month and year of birth, while in some instances, like that of the petitioner, the day, month and year of birth are not given. Now, if the records show that an allottee was born February 8, 1890, and would consequently be twenty-one years of age February 8, 1911, and further show that he was enrolled on June 9, 1899, and, in the column headed "age," his age is given as nine years, shall we say such allottee, despite *the direct and specific giving of his exact age*, shall be held to be a *minor until June 9, 1911?* Such a conclusion, it seems to us, is not to be tolerated, yet we must so hold if petitioner's argument is sound, or hold, as to *one class of allottees, the date of enrollment is conclusive* of the fact that the allottee is of the exact age shown in the age column on the date of enrollment, and that, as to *another allottee, the date of enrollment is not the date to or from*

which to calculate age, and is not conclusive of the exact age of the allottee on such day.

To hold, as petitioner would have us do, that the words and figures "June 9/99" give or were intended by Congress, under the Act of May 27, to give, for the purposes of the Act, the exact age of Thomas Gilcrease, is to resort—using the language of the Circuit Court of Appeals—to "*pure fiction*," and then take such "*pure fiction*," and not the Act of Congress, as the divining rod to determine the rights of respondents; is to convert "*pure fiction*" into an Ithuriel spear whose touch is to disclose the justice or injustice of respondents' cause. We cannot believe that this court will do so, but do believe that it should and that it will adopt and follow the rule announced by the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of Oklahoma, consonant as it is with the wording of the Act and supported by reason and authority, as its construction, and the true construction of the Act.

## II.

The construction given to Section 3 of the Act of May 27, 1908, by the Circuit Court of Appeals of the Eighth Circuit, in *McDaniel v. Holland*, 230 Fed. 945, approved by that court in *Etchen et al. v. Cheney et al.*, 235 Fed. 104, and followed by the Supreme Court of Oklahoma in many cases, and followed, also, by state and federal trial courts in Oklahoma, not being patently opposed to the language of the Act, and having become the criterion by which the age of the members of the Five Civilized Tribes is ascertained and the validity of deeds, attacked on the ground of minority, is determined, should be regarded as establishing a rule of property in Oklahoma and followed by this Court.

Oklahoma is a young and rapidly developing state, and as a consequence thereof the ownership of land changes more frequently, and ruler of law concerning real estate and the title to it become established sooner and are relied on with greater confidence in Oklahoma, in the same length of time, than perhaps, in any other state in the Union. The laws permitting the sale of Indian lands are of recent origin, and have been changed several times. These laws, as a rule, created estates, gave power to sell and deal with lands, under conditions which had never theretofore existed, and contained provisions, many of which were in conflict, or seeming conflict, with the existing laws of real estate, and for none of which perhaps did the law of real estate nor the established canons of statutory construction

furnish a sure guide for the determination of their meaning and the exact purpose Congress had in view to effect by their provisions. Lawyers, without any precedent to guide them, without any preceding decisions to enlighten them, could only give their individual judgment as to the effect of these statutes. Individual citizens acted largely on their own opinion of these laws in purchasing lands. All persons who had purchased, who owned, or intended to purchase lands, looked forward with great eagerness and interest for the first decisions on such statutes, so as to have the uncertainty as to the validity of titles put at rest, and the establishment of a criterion by which such titles could be acquired in the future with certainty that the same were valid. In the old states, when title to land is once acquired, as a rule, barring death and insolvency, it remained for many years in the same person. In Oklahoma it is rarely the case that land remains in the same ownership for any considerable length of time. Dealing and trafficking in land is perhaps as common an experience to Oklahomans as dealing and trafficking in personal property. In this condition, an opinion by the Supreme Court of Oklahoma, or the Circuit Court of Appeals of the Eighth Circuit, construing the laws relating to the sale or disposition of Indian lands, within a year from its rendition, will have been acted on by more people in actual transactions, and the acquisition of title to real estate will depend on it in



more instances, than would perhaps occur in any other state of the Union in twenty years.

It can be said, we believe, with entire accuracy, that no rule declared by the Supreme Court of Oklahoma or the Circuit Court of Appeals, as the correct construction or interpretation of an act of Congress permitting the sale of land, after being in force for a year, could be changed without striking down some thousand titles, involving a vast amount in value. If it was ever true anywhere, it is certainly true in Oklahoma, that it is better for the law to be certain than theoretically right. All the lands in the Eastern half of the State of Oklahoma are lands of the Five Civilized Tribes, and there could be no sale of any of such lands, except townsite lots, since the passage of the Act of May 27, 1908, which is not affected thereby, and the cases cited under the first head of this brief from the Supreme Court of Oklahoma, show with what frequency the question of how to determine the age of a citizen under the Act of May 27, 1908, comes before the courts. This is especially true when we bear in mind that as a rule only a few of the cases actually brought and tried reach the Supreme Court, and that the number of cases decided are but an imperfect index as to the number of cases on the road to the Supreme Court and already pending there undecided, involving the same question. It is, without question, true that the rule of construction so announced by the Circuit Court of



Appeals of the Eighth Circuit and the Supreme Court of the State of Oklahoma, has been applied in many cases in each of the counties in that portion of Oklahoma that was formerly the territory of the Five Civilized Tribes, and these cases in the aggregate will run into hundreds, and have affected, or will affect, many thousands of the citizens of the State. There is no means of determining the value of the property that has changed hands, and the amount of consideration that has been paid therefor, in reliance on the rule announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, and which would be stricken down, lost and destroyed if such rule were now changed. It is safe, however, to say that it runs into thousands in dollars, and in numbers would affect hundreds of persons. The people of Oklahoma should not be afflicted with a result so disastrous, unless it can be said that the construction placed on the Act of May 27, 1908, is so *manifestly wrong, so patently erroneous, so unjust, in its working*, that it should not be tolerated.

In reviewing conditions in Oklahoma, and applying the rule of property thereto, this court, in *McDougal v. McKay*, 237 U. S. 372, 384, say:

“And not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but considering the peculiar and rapidly changing

conditions within that State, especial consideration must be accorded to them. We accordingly accept the doctrine announced therein, and hold: (1) The property must be treated as an ancestral estate which passed in accordance with the applicable provisions of Chapter 49, Mansfield's Digest; (2) As the father, George Franklin Berryhill, was of Creek blood, and the mother not, he took a fee simple title to all the lands in question. If both parents had been of Creek blood and duly enrolled, each would have taken one-half."

In *Reynolds v. Fewell*, 236 U. S. 58, 66, speaking of the Oklahoma rule of inheritance by intermarried non-citizens, which had only been in force for a few years, this court say:

"This decision as to the right of intermarried non-citizens to inherit, has been repeatedly followed, and has become a rule of property which, recognizing the importance of security of titles, we should not disturb, unless it is clearly wrong. But, so far from the case being one of manifest error, it is apparent from the review of their provisions that the most that can be said is that the Creek laws are uncertain and ambiguous, and that their proper construction as an original question might be regarded as doubtful. It is true, of course, as urged by the plaintiff in error, that we are not dealing with a statute of the state, the meaning of which is necessarily settled by the state court. But, even where we have an undoubted right to review, we ought not to overturn in a case, at most debatable, a

local rule of construction which for years have governed transfers of property."

In *Truskett v. Closser*, 236 U. S. 223, 229, this court, speaking of the rule announced by the Supreme Court of Oklahoma in the *Jefferson-Winkler* case, say:

"The construction has become a rule of property in the state, and we should be disposed to accept it as such, even if we had doubts of the construction of the Act of May 27, 1908."

The above authorities are sufficient to illustrate our contention, and to emphasize the necessity of its adoption by this court. It is true that the statute under consideration is not a state statute, and consequently not settled by the construction placed upon it by a state court. It is, however, a statute of local application, affecting property which can by no possibility exist in any other locality. It was passed primarily to affect only lands and persons in Oklahoma, and, except in very rare cases, can only affect such persons. It has been construed in numerous cases by the Supreme Court of Oklahoma, and, so far as inducing confidence in and reliance upon such decisions by the people, such cases have the same effect as if they were in fact construing a state statute. This construction is the same construction placed on the statute by the Circuit Court of Appeals of the Eighth Circuit, in

most instances the only and final court of review of Federal questions arising in the Federal courts in Oklahoma.

Therefore, we say that this court, recognizing the importance of the security of titles, and that such security should not be disturbed except in cases of necessity, should, unless in its opinion the decisions of the Supreme Court of Oklahoma and the Circuit Court of Appeals of the Eighth Circuit are so manifestly in error, are so clearly wrong, that they plainly violate the *language and evident purpose and intent of Congress*, recognize the doctrine therein declared as a rule of property, and as such follow it, even though such doctrine is different from that which would have been announced by this court in the first instance. We do not believe that a better subject for the application of the doctrine, a more just occasion for its enforcement can arise, than is presented by existing conditions in Oklahoma.

### III.

The Act of May 27, 1908, removing all restrictions on all allotted lands of citizens of the Five Civilized Tribes not of Indian blood, and all citizens by blood of the said tribes of less than half blood, including minors, should not be construed as reimposing restrictions or creating restrictions on such classes not theretofore existing, and thus making the Act defeat its declared purpose.

The Cherokee and Seminole Agreements and the Supplemental Choctaw-Chickasaw Agreement in no manner placed a restriction on the minor members or citizens of such tribes than was placed on the adult members or citizens of such tribes. No restriction against the alienation of the lands belonging to the minor members or citizens of such tribes was grounded upon or professed to be grounded upon the fact of minority. Adult and minor members of each of said tribes were placed under the same general restrictions, and, so far as the minor members or citizens of such tribes were concerned, their incapacity to deal with their lands solely on account of minority must be found out of such treaties or agreements.

The Original Creek Agreement, after providing for the selection by guardians, etc., of allotments for minor members or citizens of the Creek Indians, provided generally that the land so selected should not be sold during minority. This, doubtless, constituted a restriction as to sale, depending

entirely upon the fact of minority. The Act of April 26, 1906, in certain instances, removed then existing restrictions—the removal including, under certain conditions, minors; so, at the time of the passage of the Act of May 27, 1908, the only restriction against a minor member or citizen of any one of the Five Civilized Tribes, resting on minority alone, is to be found in the section of the Original Creek Agreement above mentioned, and in Section 22, of the Act of April 26, 1906, (34 Stat. L. 137), which, so far as is pertinent to the discussion under this head, is as follows:

“That the adult heir of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent and, if there be both adult and minor heirs of such decedent, then such minor heirs may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory.”

The section then goes on to provide that conveyances of full-blood heirs should be subject to the approval of the Secretary of the Interior. This section of the Act of April 26, 1906, gives to the heirs of a deceased Indian a right to sell inherited lands which he did not possess—at least in a great majority of cases—prior to its passage, conferring



such right both upon the adult and minor heirs, and, for the safety of minor heirs, provided such sale should be made by duly appointed guardian, and, for the security of full-blood Indians, made the sale subject to the approval of the Secretary of the Interior. This section, it will be observed, only applies to the case of inherited lands, and does not either increase or decrease, or otherwise affect, the restrictions theretofore existing on primary allotments to individual allottees. The effect of such section is to make death remove all restrictions upon the sale of lands allotted to a deceased Indian, and to make the land the unrestricted subject of barter and sale, except that minors could only sell and dispose of their lands by joining in a sale with adult heirs by a duly appointed guardian, and that sales by full-blood heirs should be subject to the approval of the Secretary of the Interior.

Thus, at the time of the passage of the Act of May 27, 1908, there was no restriction based on minority existing as to the lands of four of the Five Civilized Tribes, and, as to such four tribes, so far as their own allotments were concerned, minor members of the tribe had the same right to sell and convey their lands as adult members of such tribes had, and sales by the members of such tribes, so far as such sale would be affected by minority, would not be controlled by the treaties or agreements but would depend upon the same general principles and be governed by the same



general doctrines of the law applicable to all minors, without regard to the status of being an Indian or a member of an Indian tribe, and that, as to minor members of the Creek Tribe, minor members of tribe would have the same right to deal with their allotments as adult members of such tribes would have, subject to the fact that the same could not be sold during minority. This being so, it necessarily follows that, at the time of the passage of the Act of May 27, 1908, the only restrictions based on minority, that could in the nature of things be removed by that Act, would be the existing restrictions on original allotments created by the treaties or agreements applicable alike to adult and minor members of the tribes, the restriction based on minority found in the Original Creek Agreement, and the restriction created by the Act of April 26, 1906, which prevented minor heirs selling inherited lands except by joining in a sale by adult heirs, and section 20 of Act prescribing method of leasing; and, unless it was the purpose of the Act of May 27 to remove such existing restrictions on the lands of minor members of the Five Civilized Tribes, the express provision that the removal includes minors is meaningless, is without force and effect, and accomplishes no purpose. Therefore, we assume it will not be contended that the Act of May 27th did not have such effect, but that it imposed a restriction where none theretofore existed. In order to determine if such was the effect of the Act, it

will be necessary to set out and review some of its provisions. Gilcrease, being only a one-eighth degree of blood, it will be only necessary to set out that portion of Section 1 of the Act dealing with citizens of less than half blood. That portion of Section 1 is as follows:

"That, from and after sixty days from the date of this Act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or encumbrance, be as follows: All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than half Indian blood, including minors, shall be free from all restrictions \* \* \* The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act."

Here, we have a *plain and explicit declaration that all lands* of allottees of the class to which Gilcrease belongs are *free from restrictions, including those owned by minors*, and, to emphasize and make clear the legislative intent to declare such lands free from all restrictions, the Act provided that it should not be "construed to impose restrictions removed from land by or under any law prior to the passage of this Act."

Speaking of this Act, the Circuit Court of Ap-

peals, of the Eighth Circuit, in *Bartlett v. United States*, 203 Fed. 410, say:

“It was not the intent \* \* \* to reimpose a restriction upon the alienation of land against which none at the time existed.”

And this court, in *United States v. Bartlett*, 235 U. S. 72, speaking of such provision of the Act of May 27th, and the effect of the word “removed,” say that it was “employed in this legislation in a broad sense, plainly including a termination of the restrictions through the expiration of the prescribed period;” and, therefore, held that, where the term of restriction imposed had expired, such restriction had been removed “by or under law,” and so was not reimposed by the Act of May 27th.

Now, in regard to many minor members of the Cherokee, Seminole, Choctaw and Chickasaw Tribes of less than full blood, all restrictions imposed by the treaties had expired by the expiration of the time limit fixed in such treaties for the existence of the restriction, and their allotted lands were free from restrictions and were the subject of unfettered commerce so far as any law of the United States was concerned, and to hold that, as to such members, the Act of May 27th imposes a restriction is to create and read into the Act a restriction not therein contained, and to make it do that which it declares it is not its purpose to do—impose a restriction where none at the time existed—thus making the Act, as to such Indians, an Act imposing

and not removing restrictions. To so construe the Act is to construe it in favor of imposing restrictions, is to construe it as exaggerating existing restrictions, and is to omit entirely from consideration the declared purpose of the Act and the plain meaning and effect of the words used, is to disregard the decision of this court in the case just cited. It is a well recognized rule of construction that restraints on alienation of land are strictly construed and will not be increased beyond the plain terms creating it, except where necessary to carry out and effectuate the purposes of the instrument containing the restriction. It is another well recognized rule of construction that an Act of Congress will not be construed as at the same time giving and taking away a right. Thus, in *United States v. Paine Lumber Co.*, 206 U. S. 467, 51 L. Ed. 1139, this court refused to extend the restriction on the sale of Indian lands to the timber growing on the land, saying:

"The restraint upon alienation must not be exaggerated. It does not of itself debase the right below fee simple. The title is held by the United States, it is true, but it is held 'in trust' for the individuals and their heirs to whom the same were allotted. The considerations therefore, which determined the decision in *United States v. Cook*, do not exist. The land is not the land of the United States, and the timber, when cut, did not become the property of the United States, and we cannot extend the restraint upon the alienation of the

land to a restraint upon the sale of the timber consistently, with a proper and beneficial use of the land by the Indians, a use which can, in no way, affect any interest of the United States."

In *McLean v. United States*, 226 U. S. 374, this court, in passing upon an Act of Congress providing for the payment to Major McLean of all pay, emoluments, etc., to which he would have been entitled had he remained in the army, in answer to the contention that a proper construction of the Act did not entitle him to all such pay and emoluments, but certain deductions should be made therefrom, say:

"An Act of Congress will not be construed as giving a right and taking it away at one and the same time, nor will the conditions making it necessary be made a reason for defeating it. The word 'all' excludes the idea of limitation."

Speaking of the word "all," the highest court of the State of Virginia, in *Moore v. F. & N. Insurance Co.*, 28 Grat. 508, say: "A more comprehensive word cannot be found in the English language." So Congress, to effect its purpose of removing restrictions on the lands of minors of the class to which Gilcrease belongs, used a word than which "a more comprehensive" one "cannot be found in the English language," and a word which this court has determined excludes the "idea of



*limitation."* So we are safe in saying that, if all restrictions on lands belonging to minors of Gilcrease's class were not removed, it must be that the general language used in Section 1 is modified by other sections of the Act of May 27th, or that, if all restrictions are removed by such Act, and then reimposed, such imposition must be found in subsequent sections of the Act. Then let us see if there are subsequent sections of the Act which have such effect, or which can reasonably be said to impose such restriction.

Section 1 of the Act of May 27th clearly divides lands belonging to Indians of the Five Civilized Tribes into two classes—restricted and unrestricted lands. Section 2 of the Act then provides:

"That all lands other than homesteads allotted to members of the Five Civilized Tribes from which restrictions have not been removed, may be leased by the allottee, if an adult, or by a guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: And *provided* further, that the jurisdiction of the probate courts of the

State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years."

Section 3 of the Act, insofar as it can have any bearing on the subject under discussion, is as follows:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

Section 6 of the Act, insofar as, in our judgment, it affects the question, is as follows:

"That the persons and property of all minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma \* \* \* Provided that no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, by order of the court, or otherwise."

These three sections are the sections usually relied upon to sustain the argument that the gen-



*limitation."* So we are safe in saying that, if all restrictions on lands belonging to minors of Gilcrease's class were not removed, it must be that the general language used in Section 1 is modified by other sections of the Act of May 27th, or that, if all restrictions are removed by such Act, and then reimposed, such imposition must be found in subsequent sections of the Act. Then let us see if there are subsequent sections of the Act which have such effect, or which can reasonably be said to impose such restriction.

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These three sections are the sections usually relied upon to sustain the argument that the gen-

eral scope of Section 1 is limited or the act reimposes a restriction on the lands of minors. We confess we do not understand the argument, nor appreciate the reasoning on which it is based. Section 1, after declaring the status of lands in reference to restriction, and thereby creating two classes of lands—restricted land and unrestricted land—contains no word of limitation on the general removal of restrictions. The effect of this section, standing alone, would, beyond preadventure of controversy, be that minors of less than half blood would, in reference to their Indian lands, be in the same condition as if they were not Indians or, being Indians, there had never been a restriction placed by Congress on their lands; namely, they would occupy the same position as any white child would in reference to land owned by it.

Is this effect changed by Section 2? Undoubtedly, Section 2—at least down to the second proviso—is dealing entirely with the second class of lands whose status has been declared in Section 1; namely, restricted lands. Such section prescribes: (a) How restricted lands other than homesteads may be leased by adult and minor allottees, and the term for which they can be leased; (b) for the leasing of restricted lands for oil, gas or other mining purposes; (c) leases of restricted homesteads for more than one year. Under such section, adult heirs may lease all lands other than homesteads, except for mineral purposes, for a period not to

exceed five years, but without the privilege of renewal. Minor allottees can make like leases by guardian or curator under the order of the proper probate court. Leases for mining purposes, leases of homesteads for more than one year, and all leases for a period of more than five years, under such section, may be made with the approval of the Secretary of the Interior under rules and regulations to be provided by him, and not otherwise. The section, having provided for leasing by guardians and curators, then provides that the probate courts shall have jurisdiction over the lands of minors and incompetents, subject to the foregoing provisions; and declares that the term "minor" or "minors" includes all males under 21 years of age and all females under the age of 18 years.

If we eliminate the second proviso from this section, there cannot be any question but that Section 2 deals entirely with, and is intended to deal alone with, restricted lands. Is its meaning affected by, or its scope enlarged by, the second proviso? We think not. We think the addition to the section made by the second proviso can be accounted for by other reasons than an intention on the part of Congress to enlarge the meaning and effect of Section 2 or modify or restrict the meaning of Section 1. The second proviso is, it seems to us, intended by Congress to apply solely to restricted lands. This is plain from the fact that the body of Section 2 is dealing alone with restricted lands and the first

proviso to such section is dealing solely with restricted lands.

The body of Section 2 immediately preceding the first proviso gives guardians of minors and incompetents full power and authority to lease all restricted lands of their wards except homesteads, for a period of five years, without the privilege of renewal. This, without more, would include the power to execute oil and gas mining leases on such lands with the approval of the probate court. The office of the first proviso limits this general grant of power and provides that oil and gas mining leases and the other leases mentioned in the first proviso can only be made with the approval of the Secretary of the Interior or subject to such rules and regulations as he may provide, and not otherwise; thus, so far as the body of Section 2 and the first proviso are concerned, it is evident that Section 2 is dealing alone with restricted lands. What then in the *second proviso discloses a different intention on the part of Congress?*

The second proviso is not a grant of jurisdiction to the probate courts over restricted lands or unrestricted lands of Indians, it is but a recognition of an existing jurisdiction over the restricted and unrestricted lands of Indian minors and incompetents. Prior to the passage of the Act of May 27, it had been held that under Section 20 of the Act of April 26, 1906, which section, without the second proviso, is in substantial accord with Sec-



tion 2 of the Act of May 27, that probate courts had exclusive power to approve oil and gas mining leases made by guardians of minors and incompetents, and that such leases did not depend for validity upon the approval of the Secretary of the Interior, and did not have to be submitted to him for approval. Congress, remembering that Section 20 of the Act of April 26, 1906, giving the Secretary of the Interior jurisdiction over the leasing of restricted Indian lands and providing that leases of the lands of minors and incompetents could be made under order of the proper court and that such proviso had been construed to remove the lands of minors and incompetents from the jurisdiction of the Secretary of the Interior as to mining leases and fearing that Section 2 of the Act of May 27th and the first proviso thereto might be given the same construction by the courts, in order to prevent such a construction, limits the existing jurisdiction of probate courts by the second proviso by recognizing the existence of the jurisdiction and then providing that such jurisdiction shall be "subject to the foregoing provisions," and then goes on to define the meaning of the term, minors.

The jurisdiction of the probate courts limited by Section 2 must be jurisdiction over restricted lands because such lands and the manner of dealing with them, are the subjects of which such section is treating and for the further fact that the words, "subject to the foregoing provisions," re-

fer to provisions which affect restricted lands alone.

When Section 1 removed restrictions from the lands of designated classes of Indians, such lands immediately became subject to the jurisdiction of the probate courts of Oklahoma to the same extent as if they had never been restricted, and the context of the Act shows that such lands were considered as removed from the jurisdiction of the Secretary of the Interior. Restricted lands of Indian minors and incompetents, being subject to the jurisdiction of the Secretary of the Interior, and likewise being subject to the jurisdiction of the probate courts of Oklahoma, this dual jurisdiction, if undefined, would in all probability be the occasion of frequent conflict. *This conflict, Congress sought to eliminate by making plain and explicit the extent and limit of the jurisdiction of the Secretary of the Interior* and to provide wherein the jurisdiction of the Secretary should be *paramount* and wherein the jurisdiction of the probate courts of Oklahoma should be *subordinate*, and in order to carry out its purpose and design, enacted the second proviso, and it is submitted that the second proviso accomplishes this purpose, and when so considered does not in any manner appear ambiguous nor have the effect to enlarge the scope of Section 2 so as to make it modify Section 1, or to embrace unrestricted lands. Under the section as a whole, all leases of restricted lands other than



homesteads and mining leases made by guardians of minors or incompetents, where such leases do not exceed five years and do not contain a privilege of renewal, the jurisdiction of the probate courts is *paramount* to that of the Secretary of the Interior, and such leases do not have to be submitted to him for approval. *As to all other leases, the jurisdiction of the Secretary is paramount.*

The power of the United States over restricted Indian lands being supreme, and its department of the Interior and the agents of such department exercising powers of guardianship and control over restricted lands and such control having generally been held to be superior to that of the probate courts, Congress intended by the second proviso to remove any doubt as to such *jurisdiction being supreme*, except in the instances in which *exclusive jurisdiction was conferred on the probate courts* and having conferred jurisdiction on the probate courts of the State of Oklahoma over the lands of Indian minors and incompetents and the probate courts of Oklahoma having jurisdiction under certain conditions to sell and dispose of the estates of minors, Congress, still dealing with and having in mind lands which were restricted, provided that such jurisdiction should be limited by the foregoing provisions of the section.

This declaration was inserted in the act, evidently for the purpose of preventing the argument being made that as the probate courts of Oklahoma,

under certain conditions, had the power to sell lands and to make leases for unlimited terms, such courts would have power under such statutory conditions to *lease and sell restricted Indian lands despite the prohibition contained in Section 1 and in "the foregoing provisions" of Section 2*, and therefore, in order to avoid any conflict of authority, to forestall any such argument, Congress, by the second proviso, declared the jurisdiction of the probate courts should be *subject to the foregoing provisions*, that is, notwithstanding the general constitutional and statutory provisions giving control to the probate courts of Oklahoma over the estates of minors and incompetents, such general jurisdiction should not extend to the restricted lands of Indian minors and incompetents, but such general jurisdiction should be limited by the preceding provisions of Section 2, viz: that notwithstanding such general constitutional and statutory power, the probate courts of Oklahoma as to restricted lands of minors, could only approve a lease of the surplus lands for a term not exceeding five years, without privilege of renewal, that notwithstanding such general jurisdiction, such courts could not (a) make a lease of restricted homesteads for more than one year, (b) could not sell the lands of such minors, (c) could not make a lease on the surplus lands for more than five years, (d) could not make a mineral lease on such land, but that all such leases could only be made with the approval of the Secre-

tary of the Interior and under the rules and regulations prescribed by him, and not otherwise.

It is evident that Section 3 can in no manner affect the meaning of Section 2 because it only prescribes the method by which the minority of the members of the tribe is to be determined and makes the evidence of such minority therein prescribed conclusive of the fact, so the language of Section 1 and Section 2 can neither be enlarged, limited or otherwise controlled by Section 3, so taking Sections 2 and 3 together, it cannot be successfully contended that they constitute a *limitation on the general release of all lands of all allottees of less than one-half blood, from all restrictions.*

To say that Section 2, by reason of the second proviso, does constitute such a *limitation*, is to place it in opposition to the purpose of Congress as *exactly and plainly declared in Section 1*, and is to say that, notwithstanding the general and unlimited freedom of such lands declared in Section 1, neither the minor, his guardian or curator, nor the minor, his guardian, curator or the probate court together, can make a lease on his homestead for more than one year, that not one, nor all of them together, can make an oil and gas mining lease on any part of his land nor a lease of any kind for more than five years unless such lease be submitted to the Secretary of the Interior for approval. Such a result, it seems to us, cannot be tolerated for a moment, nor can the language of

such section be tortured into any such meaning or as having any such effect.

That such would be the effect of the second proviso, if it is to be held to apply to restricted and unrestricted lands, is at once evident from its perusal and to make this plain, we again quote the second proviso which is, "and provided further, that the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors as used in this Act shall include all males under 21 years and all females under the age of 18 years."

It appears too plain for argument that unless the limitation placed on the jurisdiction of the probate courts of Oklahoma applies, and was intended to apply only to restricted lands as opposed to lands from which restrictions had been removed or on which restrictions did not at the time of the passage of the Act exist, then the limitation, "subject to the foregoing provisions," limits the jurisdiction of such courts, *both as to restricted and unrestricted lands, and places both classes of lands under identical restrictions*, and consequently the probate courts, the minor and his guardian, acting separately or together, cannot make a lease on his surplus lands for more than five years, cannot make a lease on the homestead lands for more than one year, and cannot make a mining lease on any of the lands, but, for any such of the last named in-

struments to be valid, they must be approved by the Secretary of the Interior because the only things to which the words "subject to the foregoing provisions" can limit the jurisdiction of the court are the things just set out.

It cannot be, it seems to us, that said Section 6 constitutes a limitation on the freedom from restriction granted by Section 1, either by itself or in conjunction with Section 2. To quote from such section again, the material parts affecting the subject under discussion are as follows:

"That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma \* \* \* provided that no restricted lands of living minors shall be sold or encumbered except by leases authorized by law, by order of the court, or otherwise."

This is a direct grant of jurisdiction to the probate courts of Oklahoma over the persons and property of all minor allottees of the Five Civilized Tribes. This general grant of jurisdiction is followed by the limitation "except as otherwise specifically provided by law." This includes not only all the provisions in the act preceding Section 6, but all provisions succeeding Section 6 and all provisions in any other laws of the United States. Such limitations on the jurisdiction would have been read into the section in event the section had



*failed to set them out, for a general grant of jurisdiction would not be allowed to repeal special provisions in conflict therewith unless the intention to repeal was manifest.*

The general grant of jurisdiction over the persons and estates of minor allottees followed by the exception noted is equivalent in law to granting general jurisdiction and then excepting from the general grant the specific things that the probate courts are prohibited from doing, thus making the section in legal effect the same as if it granted general jurisdiction and then provided that notwithstanding the grant of such general jurisdiction, the probate courts could not in reference to *restricted lands of Indian minors* do any of the things prohibited by Section 1, Section 2, Section 5, Section 6 or any other section of the Act of May 27th, or any other Act of Congress.

It is difficult to see, to us it is impossible to see, how the words of limitation on the jurisdiction of the power of probate courts contained in either or both of such sections constitute a restriction on the alienation of lands from which all such restrictions have been removed, unless we assume that the mere fact of conferring jurisdiction on probate courts over the persons and estates of minors be sufficient in and of itself to constitute such a restriction and in and of itself sufficient to declare such to be the Congressional purpose.

The general grant of jurisdiction as has al-

ready been stated would be subject to the exceptions created by law.

The laws of Oklahoma specifically confer jurisdiction on the probate courts over the persons and estates of minors and it is believed that the laws of all states confer like jurisdiction on probate courts, or some court having probate jurisdiction. This jurisdiction is in the nature of things general except where it is otherwise specifically provided by law and conditions and exceptions to the jurisdiction of probate courts are contained in nearly all laws. Can it be said with any degree of reason that the general grant of jurisdiction on probate courts over the persons and estates of minors found in all states constitutes a restriction on the alienation of the estates of such minors? Jurisdiction is conferred by all states on probate courts or courts of like jurisdiction over the persons and estates of minors. The exercise of this jurisdiction is generally made to depend on certain precedent steps, yet, the grant of such jurisdiction and the providing that such jurisdiction as to the alienation of such lands depend upon the existence of certain facts has never yet been held to constitute a restriction on alienation and despite such grants, the minor has generally been held to be capable of conveying his land in fee and that a conveyance in fee by a minor is valid and binding, subject alone to his power to avoid the conveyance on his arriving at age, unless he is permitted by statute, as is the



case in Oklahoma, to avoid the sale before arriving at majority. If this be true, and it undoubtedly is, how can we construe, by what process of reasoning can we hold the grant of jurisdiction contained in Section 6 "except as otherwise specifically provided by law" to be a restriction on alienation.

The words in Section 6 "except as otherwise specifically provided by law" primarily refer to the express limitations contained in Section 2, the limitation on the sale of land contained in Section 5 and the limitation contained in the proviso in Section 6, that *restricted lands of no living minor* shall be sold or incumbered except by lease authorized by law, by order of the court, or otherwise.

Unless Section 6 in connection with the other sections above noted, reimpose a restriction or modify the removal of restrictions, there is nothing in the Act of May 27th which reimposes a restriction or in any wise modifies the removal of restrictions for Section 1 of the Act expressly removes restrictions from certain designated classes of lands and then proceeds to deal with lands from which restrictions have not been removed and provides for the removal of such restrictions.

Section 2 is dealing alone with restricted lands; Section 5, in express terms, deals with restricted lands and declares that an attempted alienation or incumbrance of such lands by any method or instrument which affects title thereto prior to the removal of restrictions shall be void. In Section 5,

*the inability to sell is by the express words of the section applied to lands from which restrictions have not been removed and the prohibition contained in the proviso of Section 6 is against the sale of restricted lands.*

The restriction against sale in Section 6 is confined by the express words of the proviso, to "restricted lands of living minors"; the restriction being confined to lands of living minors doubtless because death removed restrictions except as to the heirs of full blood and in such last case, retained only a qualified restriction against alienation, viz: that a conveyance made by such heir should be approved by the court having jurisdiction of the settlement of the estate of a deceased allottee.

If it be asked why the proviso was placed in Section 6 and why an exception was made by Section 6 to the general jurisdiction of probate courts, it can only be answered that Congress intended to make plain that by granting to probate courts of Oklahoma power and jurisdiction over the estate of minor allottees, it did not intend that such power should extend to or that it could be fairly argued that such power did extend to *restricted* Indian lands so as to authorize such courts to sell such restricted lands, or to lease such restricted lands except as provided in the Act, and that as Section 5 did not expressly prohibit the sale of restricted lands of minors by the probate courts, that the general grant of jurisdiction conferred on pro-

bate courts the same power to sell lands belonging to restricted Indian minors that it would have to sell the lands of its white citizens, and the restriction contained in the proviso to Section 6 was inserted for the purpose of preventing a possible conflict between such sections and Section 9.

The grant of jurisdiction in Section 6 coupled with the limitation on its exercise and followed by the restriction in the proviso illustrates and emphasizes the intention of Congress to grant only a limited jurisdiction over *restricted lands* and evinces anxiety on the part of Congress that this intention should not be evaded, but evidences no intention to reimpose restrictions removed by Section 1, nor to in any way limit, confine or abridge the general jurisdiction of probate courts over the persons and estates of Indian minors whose lands were *free from Congressional restriction*. This, indeed, it cannot be held to have done, unless we shut our eyes to the provision in Section 1 of the Act that it is not the intention of Congress to impose restrictions on land from which such restrictions have been removed.

A contrary conclusion would accomplish that which Congress has declared it had no intention to do, as a large number, perhaps a majority of the Indian minors of the Five Civilized Tribes belonging to the classes designated in Section 1 from whose lands restrictions are thereby removed, such

restrictions had *already expired by operation of law prior to the passage of the Act.*

Again, it seems clear that there are two general classes of lands treated of in the Act, unrestricted lands and restricted lands, and that as to restricted lands, it is specifically provided the probate courts will have no power to lease or sell, except in the particular instances where such power is expressly conferred by law. Now it follows, that if the Act, after removing restrictions on the lands of certain designated classes of minors, reimposes such restrictions for and during the time of minority that the lands of all *minors, at least during minority*, are restricted lands and as such are subject to the jurisdiction of the Secretary of the Interior, and can be leased only in the manner prescribed in Section 2 and can be sold only after death has removed restrictions as provided in Section 9. Such a result is manifestly not what Congress intended and is directly in the teeth of some of the express provisions of the Act and consequently such a conclusion should not be reached unless we are driven to it by language so plain that its meaning cannot be misunderstood.

The prohibition against alienation, except by lease made by order of court, contained in the proviso to Section 6 confined as it is by express words to restricted lands of living minors, *constitutes by plain and direct implication, constitutes by well recognized canons of construction permission to*

otherwise lease and sell unrestricted lands of living minors to the same extent as if such permission had been explicitly given in plain words.

The argument here made, that the Act of May 27th, does not impose a restriction on lands from which the restriction has been removed by Section 1, is not opposed to any decided case in Oklahoma. It is true, starting with *Jefferson v. Winkler*, the Supreme Court of Oklahoma has said that, considering Section 2 and Section 6 of the Act with Sections 5 and 3, Section 1 of the Act removed restrictions as to minors of certain designated classes, and that the other sections reimposed a restriction forbidding alienation except through the agency of the county courts. Such question was not, however, before the court in any case that had arisen prior to the case at bar, the sole question in any of the prior cases being whether the Act of the Legislature of Oklahoma conferred on minors who were married the right to dispose of their property as if of age; whether the removal of disabilities by a decree of court, under the Oklahoma statute, conferred the rights of majority and invested the Indian with the right to sell land as if he were not a minor under the Act of May 27th; or the cases involved the right of an Indian to set aside a deed after becoming of age when there was no question of ratification or adoption after he became of age, or they involved the statute of Oklahoma forbidding a minor over 18 years of age to



bring an action setting aside a conveyance made during minority without return of consideration received therefor. The right in each class of cases was denied, and correctly denied, though, in our opinion, the reasoning on which the denial was based was and is unsound. There are many of these cases, and it will serve no good purpose to quote from or analyze all of them, so we will only review a few of the earlier cases which lay down the doctrine, as examples of the class, and will then review the leading federal cases involving the same question, point out what in our judgment is the difference between the federal and state decisions, and then review some of the recent Oklahoma cases which, in our judgment, sustain the doctrine of the federal cases.

In *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755, the Supreme Court of Oklahoma was entirely correct in holding that Section 1 of the Act of May 27th removed restrictions on the lands of minors belonging to the designated classes therein, but the question whether the Act reimposed a restriction was neither before the court, nor was it necessary to be decided in order to arrive at the result reached; the sole question in that case and the sole question in all cases prior to the case at bar, arising under the Act of May 27th, being whether a state law, by its own force, could confer on an Indian minor, during the period of minority prescribed by Congress, the powers and privileges of

majority, or authorize a court of the State of Oklahoma so to do, or affect the disabilities of minority imposed by federal law during the prescribed period.

Rebecca Johnson, the allottee, belonged to a class from whose lands restrictions were removed by Section 1, and, during her minority, married. After her marriage, and while still a minor, she made a deed of her lands. Her guardian made application to sell her lands. The order of sale was granted. An injunction was sought to prevent the sale, on the ground that the deed made by Rebecca Johnson was valid to the same extent as if by an adult, and the sale would be a cloud on the title conveyed by such deed. After disposing of questions of practice, the court proceeds to consider the Act of May 27<sup>th</sup>, and after setting out portions of the Act and the contention of the parties in reference thereto, the court, speaking of Section 1, say:

“The restrictions with which this section of the Act deals include restrictions upon all allotted lands of members of the Five Civilized Tribes of Indians having less than half blood. The restrictions referred to throughout this section are those restrictions upon the power of the allottee to alienate his allotted lands which are imposed by the provisions of the federal acts and treaties under which the distributive share of such tribal lands of each of the Five Civilized Tribes has been, or is to be, allotted to the respective members of said



tribes. Such restrictions of the first and second class named above are removed as to both adults and minor allottees. The restrictions upon the third class are continued as to both adult and minor heirs until 1931, unless sooner removed by the Secretary of the Interior. In other words, the effect of this Act upon lands of allottees of the different tribes is to divide them, with respect to the restrictions upon the alienation, into two classes: First, those upon which the restrictions are removed, and, second, those upon which the restrictions are continued until 1931. Rebecca Johnson is an allottee of the first class provided for in said section, and after the Act became effective, the restrictions upon her power to alienate allotted lands were removed without any limitations or conditions imposed by federal act or treaty, and she held the same as other minor citizens of the United States and of this state held their property unless limitations were imposed thereon by subsequent sections of the Act."

The court then goes on to say, on page 665:

"In other words, construing all of the foregoing provisions of said Act together, we think it was the legislative intent to provide that the allotted lands of freedmen and mixed Indians having less than half Indian blood, under the age of 18 years if a female, and under the age of 21 if a male, may be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise."

In *Kirkpatrick v. Burgess*, 29 Okla. 121, 116 Pac. 764, the court says:

"The marriage of a minor male ward member of the Cherokee Tribe of Indians of less than one-half blood does not, of itself, terminate his guardianship as to his allotment, nor abate the jurisdiction of the county court, and a guardian, under such jurisdiction, has authority to make a sale of said minor's allotted land."

In *Gill v. Hagerty*, 32 Okla. 407, 122 Pac. 641, the court, speaking of the Act of May 27th, say:

"The fact that marriage does not of itself, however lawful, remove the disability of a male Creek allottee under 21 years of age, in regard to the sale of his allotment, renders it useless to discuss the very interesting question of collateral attack on a marriage contract, and the introduction of evidence tending to show that its consummation was brought about through the fraudulent conduct of other parties expecting to profit thereby."

In *Tirey v. Darneal*, 37 Okla. 606, 133 Pac. 614, speaking of the deed made by an Indian not of age as shown by the enrollment records, the court say:

"The deed was void, of that there can be no doubt. Section 6, of the Act of Congress approved May 27, 1906 (35 Stat. 313, c. 199), which deals with the subject of the removal of restrictions from lands of allottees of the Five Civilized Tribes provides that the persons and property of minor allottees of said Civilized

Tribes shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate courts of the State of Oklahoma. This provision of that act is in the nature of a restriction by Congress on the alienation of lands belonging to minor allottees, and can be removed only by a regular proceeding provided by statute through the instrumentality of the county court. It has long been the policy of Congress, upheld universally by the courts, that the alienation of restricted Indian allotments was not only prohibited but all such attempted conveyances were void. As was said above, this conveyance by Darneal to Tirey, by reason of the provisions of the Act of Congress, *supra*, was not voidable but void."

The foregoing decisions may be taken as typical of the class to which they belonged, and are selected for the reason that some of them have been cited in the opinions of this court. An examination discloses that the real ground of decision in all of them was the *supremacy of the federal law over the state law, and that each of the decisions is correct though sustained by unsound reasoning.*

In *Jefferson v. Winkler*, the question was, as we have seen, whether a deed made by an Indian minor could be given the same force and effect as a deed made by an adult by virtue of the fact she had married, and a statute permitted married minors to sell lands with the same effect as if adults. In the *Kirkpatrick* case, the same question in another phase was involved. In such cases, it was contended

that the county court could not appoint a guardian nor authorize a guardian to sell the lands of a minor Indian, because, under the laws of Oklahoma, marriage of itself terminated guardianship and the marriage of an Indian minor conferred upon him the right to sell his lands with the same force and effect as if an adult. In the Gill case, the Indian was again a married minor, and it was sought to set aside his deed on the ground that he had been fraudulently induced to marry in order to make the deed. In *Tirey v. Darneal*, the allottee was a married minor Indian of the class from whom restrictions had been removed, and it was contended that the deed made was good because of the fact of marriage. It was sought to sustain the deed or to compel the return of the purchase money before setting aside the deed. The facts being as above stated, it is evident that no question of the reimposition of restrictions or the existence of restrictions on the land notwithstanding Section 1, or whether such deeds were void or voidable, was before the court for determination. Each of the actions was brought by virtue of local statute before the expiration of minority, and in each case it was attempted not to give the deeds the same force and effect of deeds by minors, but to give to them the same force and effect as if they had been executed by adults. *To do this would make the local law dominate the federal law in the control of Indians.* This, the court held and very properly held, could not be done, but that the federal law dominated and controlled the local law.

Turning, now, to the federal authorities. In *Bell v. Cook*, 192 Fed. 597, the Circuit Court for the Eastern District of Oklahoma, through Judge Pollock, speaking of the Act of May 27th, say:

“Viewed in this light, it is clear the allottee, being a minor female freedman under 18 years of age at the date of her conveyance to R. L. Cook, was free from all government restriction against her power of alienation, except such disqualifying conditions as was common to all minors under the laws of the state. As has been seen, the statute law of the state above quoted does not authorize its female citizens under 18 years of age, lawfully married, to convey their property regardless of the fact of minority, because, in contemplation of such law, the fact of marriage in and of itself removes this disability of minority; yet, as to such wards of the government as was the allottee freedwoman in this case, although married, still, as shown by the public rolls, she remained a minor under the act in question. Therefore, she could dispose of her property by that method only open under the law of the state to persons of her class, regardless of the fact of her marriage.”

In *Truskett v. Closser*, 198 Fed. 835, the Circuit Court of Appeals of the Eighth Circuit, after setting out the facts showing the attempted removal of the disabilities of nonage of a minor Indian citizen, say:

“The exclusive right to determine when Goodman was of age was in Congress so far



as his allotment was concerned. It declared that he should not become of age until he was twenty-one. A law of Oklahoma which declared that he should become of age at twenty would be in conflict with the Act of Congress, and would be void, so any act of the state which authorized any of its courts to determine that Goodman became of age when he was twenty, or that, at such age, he had the rights of an adult, would be in contravention of the same law, and would also be void."

And, in speaking of the *Jefferson v. Winkler* case, the court say:

"The construction of this Act came before the Supreme Court of Oklahoma in the case of *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755. In that case, an Indian girl married when she was under 18, and, while under that age conveyed her allotment. It was held that, under the general law of Oklahoma, the marriage emancipated her, but this general law could not have effect in her case in view of the provisions of the said Act of May 27, 1908, and that her conveyance was void."

In *Ligon v. Herteel* (not officially reported), the District Court of the Eastern District of Oklahoma say:

"By reference to the Act of Congress approved May 27, 1908, it is seen (Section 1) that all the restrictions upon alienation of the land of this plaintiff had been removed at the time of the execution of this lease, but that, for the purpose of this consideration, she must

be considered as under the age of 18 when the lease was made (Section 3), and was, therefore, a minor (Section 2), and in her person and property was subject to the jurisdiction of the probate courts of the State of Oklahoma. Being a minor, her right to execute the lease must be decided by the laws of the State of Oklahoma in force at that time."

In *Truskett v. Closser*, 236 U. S. 223, this court, speaking of the Act of May 27th, say:

"These sections are circumstantial and contain the elements of decision. Section 2 defines minors, male and female, and provides for the disposition of their property under, as stated, rules and regulations provided by the Secretary of the Interior, and declares that the jurisdiction of the probate courts of the state shall be subject to its provisions. Section 6 declares to what courts the property of minors so defined shall be subject. Explicitly, such property is made 'subject to the jurisdiction of the probate courts of the State of Oklahoma.' The qualification 'except as otherwise specifically provided by law' means, as said by the Circuit Court of Appeals, federal law and not state law."

Further along in the opinion, the court say:

"and the courts, both state and federal, have found no difficulty in determining its meaning or its dominance over the provisions of the state law."

This court, then, speaking of the *Jefferson-Winkler* case, and giving what it considers the grounds



on which the state court based that decision, say:

“The court, therefore, decided, upon a construction of the Act of May 27, 1908, and of the laws of the state, that the latter, removing the disability of minority, do not extend to minors as defined by the Act of Congress.”

A careful consideration of these cases shows that the real question involved in all of them was the dominance of the federal law over the state law, in reference to the validity of the deeds attacked. The state courts decided the question on the same grounds that the federal courts did, though the real reason was not as explicitly given, and some reasons, in themselves unsound, were given. The federal courts unmistakably give their reasons why the deeds attacked were subject thereto, the reason of the federal courts being based alone upon the dominance of the federal statute, thus giving the true reason. So we say that, eliminating unnecessary verbiage and unnecessary reasoning from the opinions of the Supreme Court of Oklahoma, the decision in each of the cases was correct and is in entire accord with the federal decisions, and, together, these decisions establish, and, when rightly considered, establish alone, the conclusion that the Act of May 27, from the classes named, removes the restrictions on the lands of minors; that such lands are free from all restrictions as is declared by such Act, but that such Act prescribes the period of minority, and, during such period so prescribed, no act of the Legislature of Oklahoma, no judicial dec-

lation of its courts, can abrogate or do away with the effect of such minority and permit the Indian minor to deal with his land with the same force and effect as if he were in fact of age. This is the correct construction of the Act of May 27th. It is one in direct accord with the language of the Act. It is in consonance with its declared purpose. It does not take from or add to the Act, and, Congress having declared the Indians to be minors during certain prescribed periods of time, the *disabilities as well as the benefits*, if such there be, of minority attached to the declared status, and no legislative Act, no judicial decree of the state authorities could take from nor add to such disabilities, could increase or decrease, in any way or by any method, the prescribed period of minority, nor, during such prescribed period, defeat the purpose of Congress by indirectly permitting or authorizing a conveyance of lands by the minors with the *same force and binding effect as if executed by adults*. Recurring again to the Oklahoma decisions, and especially to the latter ones, and selecting therefrom typical cases, we find that the Oklahoma court now recognizes the basis of the decisions in the earlier cases to be as we have outlined.

In *Collins Investment Co. v. Beard*, 46 Okla. 310, 148 Pac. 846, the court say:

"In other words, if a state law, by its language, or through its particular construction or its operation, would permit the alienation of a restricted Indian allotment, or render a

deed thereto effective where the land would not be alienable or the deed thereto effective under the Act of Congress dealing with the subject-matter, then the state law fails, and this because the federal government retained jurisdiction in these Indian matters to the extent stated in the Enabling Act, under the terms of which Oklahoma became a state, and this reservation of jurisdiction was assented to in the Constitution which the people adopted. To give the desired construction to either of the statutes under consideration would be in effect to accomplish the removal of federal restrictions from the sale of allotted lands by means of state legislation. Once conceding this principle, it is easily seen that the federal control would be interfered with and might ultimately be entirely suspended. No such construction is possible."

In *Klaus v. Campbell-Ratcliff Land Co.*, 48 Okla., 150 Pac. 676, speaking of the *Jefferson-Winkler* case, the Supreme Court of Oklahoma say:

"This court held, in *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755, in dealing with a minor of the Creek Nation, that a minor includes males under the age of 21 and females under the age of 18 years, and the marriage of such minor does not confer upon him or her authority to sell his land or her allotted land independent of the supervision of the probate courts of the state."

In the *Collins* case, *supra*, the Oklahoma court again says:

"The statutes above referred to need no analysis or even a construction here, for the

reason that, when the question of the removal of restrictions from allotted lands, or the right of alienation of such lands, or the power of alienation is involved, we must look to the Acts of Congress, and to those acts alone."

It is thus seen that this court, the Circuit Court of Appeals of the Eighth Circuit, the Supreme Court of the State of Oklahoma, and the local federal courts of such state have, in effect, put the same construction upon the Act of May 27, 1908, as we do, and have interpreted *Jefferson v. Winkler* in the same manner that we do; that is, that the sole dominant question necessary for decision in such case and the cases that have followed it, and the question really decided, was the control and precedence of federal law on this subject over the state laws, and that the necessary result from all of such decisions is that, as to members of the Five Civilized Tribes of less than half blood, the Act removed all restrictions and placed minor owners of such land, in reference to their lands, in the identical position they would occupy if they were not Indians, except that neither the state courts nor state legislature, nor both combined, could change the status of such members as minors. They could neither prevent action by the minor owners which minors would be authorized to take, nor could they give effect to any such act or make it more binding on the minor than would the same action be without state legislative or judicial declaration.

#### IV.

That acts are spoken of in statutes and judicial decisions as being void does not necessarily mean such acts are void in the technical meaning of such term, but, more often, mean that the acts prohibited are declared void or voidable, as acts are rarely, if ever, void in the full technical significance of such term.

Assuming, for the purposes of the argument, that the courts of Oklahoma have held deeds and leases of minor Indian allottees of less than half blood to be void, it does not necessarily follow that such transactions are absolutely void in the sense that no right or obligation can be founded upon or grow out of them, and does not necessarily mean any more than to have said such transactions were voidable. Courts will long hesitate before they declare an act or transaction absolutely void in the technical sense of the word, and will not do so unless driven thereto by express statutory enactment or the act itself is so inherently vicious and immoral as to shock the conscience of mankind, and no right growing out of it can be enforced except by consummating the moral wrong with which the transaction is tainted or giving effect to the vicious and forbidden purpose sought to be prevented. Except where a transaction is founded on or grows out of some inhering moral obliquity, disregard of human rights, or endangers the established customs and institutions of organized so-



ciety, no contract or act has ever been or ever will be declared by a court to be absolutely void in the technical meaning of that term, unless such a holding is compelled by the express letter and commandment of some statute. The word "void" generally means "voidable," and, at this time, such may be said to be its primary meaning, and declarations in opinions of courts and in statutes that certain things or acts are void usually mean only that such things are voidable, and are not to be declared void in the sense that they are incapable of conferring any right, or ratification, or affirmance unless, from the context, such construction of the word is essential to carry into effect the purpose and design of the law, or is necessary to prevent the court from giving its aid or countenance to a transaction innately immoral. It is, perhaps, unnecessary to quote any authority in support of the doctrine above announced, and we will only do so to a very limited extent.

In *Weeks v. Bridgman*, 159 U. S. 541, 40 L. Ed. 253, this court had before it for construction an act which provided that, as to certain lands not contained in a prescribed list, the act as to such lands "shall be perfectly null and void and no right, title, claim or interest shall be conveyed thereby." This language seems to be as strong as can well be used, and to be all embracing. It is hard to conceive how a thing can be more than

"perfectly null and void." In construing this act, the court say:

"A distinction between void and voidable acts need not be discussed. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act, while things are often said to be void which are without validity until affirmed."

In *McMichael v. Murphy*, 70 Pac. 189, the Supreme Court of the Territory of Oklahoma say:

"The distinction between a void and voidable act is clearly and tersely stated by Mr. Chief Justice Fuller in *Weeks v. Bridgman*, 159 U. S. 541, 40 L. Ed. 253, as follows: 'It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act, while things are often said to be void which are without validity until confirmed.' Applying these decisions, which this court must regard as final and authoritative, to the case at bar, it follows that White's homestead entry was *prima facie* valid; that its validity had to be determined by a competent tribunal, and that tribunal was the Land Department of the United States."



In *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682, the court say:

"It is quite true that the usury statute referred to declares a contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used in statutes and legal documents such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is capable of being avoided and not as meaning that the act or transaction is absolutely a nullity as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances."

In *Downs v. Blount*, 170 Fed. 15, the court had before it a married woman's deed not acknowledged in accordance with the laws of Texas, and such deeds had been declared by the Supreme Court of Texas void. In passing on the question of whether the deed was void or voidable, the court say:

"Much of the argument of learned counsel for the defendants in error is based on the proposition that the deed in question is void. The application of the statute to this deed is referred to as an attempt 'to make a deed where none existed.' On the other hand, the attorney for the plaintiff in error insists that the deed offered in evidence was not absolutely void, but that it is an instrument defectively executed, which at least conferred equitable rights. These contentions present a question of much importance, for while the

legislature might have power to pass an act which removes a defect in an existing inchoate or ineffective contract, it might not have the power to create a conveyance—to make a contract between the parties. Cases are cited from the Texas court of last resort, saying in plain words that the deed of a married woman defectively acknowledged and proved, is void. If we accepted these expressions as conveying the real meaning of the court, these cases would be conclusive as to this contention. But we know that the word 'void' is often used in the sense of voidable, or invalid, or non-enforceable; that it has almost lost its primary meaning and when it is found in a statute or judicial opinion it is often necessary to resort to the context to determine precisely what meaning is to be given it. . . . We are of the opinion that the deed was admissible in evidence, and, when admitted, it should be 'given the same effect as if it were not so defective.' This conclusion is also applicable to the other deed which was excluded on the same grounds."

*In Allis v. Billings*, 6 Metcalf 415, the Supreme Court of Massachusetts say:

"The question raised in the present case is whether the deed of one who is insane at the time of the execution thereof is void absolutely, or merely voidable. The term void, as applicable to conveyances or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contra-distinguished from voidable, it being frequently introduced, even

by legal writers and jurists, where the purpose is nothing further than to indicate that a contract is invalid and not binding in law. But the distinction between the terms void and voidable, in their application to contracts, is often one of great practical importance, and whenever entire technical accuracy is required, the term void can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification. The question then arises, is the deed of a person *non compos mentis* of such a character that it is incapable of confirmation? This point is not now for the first time raised, but has been the subject of comment both by elementary writers and in judicial opinions. Mr. Justice Blackstone, in his Commentaries, Vol. II, p. 291, states the doctrine thus: 'Idiots and persons of non-sane memory, infants and persons under duress, are not thoroughly disabled to convey or purchase, but *sub modo* only, for their conveyances and purchases are voidable and not actually void.' Chancellor Kent says: 'By the common law a deed made by a person *non compos* is voidable only and not void.' 2 Kent Com. (4th ed. 451.) In *Waite v. Maxwell*, 5 Pick, 217, this court adopted the same principle, and directly rules that the deed of *non compos*, not under guardianship, was not void, but voidable. \* \* \* It may seem somewhat absurd to hold that a deed should have any effect when wanting in one of the essential elements of a valid contract, viz., that of parties capable of giving an assent to such contract. But this obligation as strongly applies to cases of deeds executed by infants who are alike wanting in

capacity to make a binding contract. Yet this principle of giving so much effect to the contract as removes it beyond that of a mere nullity, and renders it, to some present purposes, effectual and susceptible of complete jurisdictional ratification, is well settled and understood as to infants who enter into contracts, and it will be found that there is a common principle on this subject, alike applicable to the inability of the contracting party, arising from infancy or lunacy."

In *Haggart v. Wilczinski*, 143 Fed. 22, the Circuit Court of Appeals say:

"The Mississippi Supreme Court used the expression that the sale was 'absolutely void,' but the point passed on was raised by a demurrer to the part of the bill that alleged title in Allen, so the decision was to the effect that the sale and conveyance by the substituted trustee was 'absolutely void' as an attempted transfer of the title to the land. The word 'void' is so often used in the sense of 'voidable' as to have lost its primary meaning, and, when it is found in a statute or judicial opinion, it is ordinarily necessary to resort to the context in order to determine precisely what meaning is to be given to it. The word, when confined to the effect of the sale and conveyance as a transfer of title, the matter under consideration, was used by the learned Supreme Court with accuracy and technical precision. A purchase by a trustee at his own sale is certainly void as to the beneficiary in the trust. It is void because the seller is not permitted to buy at his own sale. The word

'void,' however, is frequently used even by legal writers and jurists where the purpose is nothing further than to indicate that a contract is invalid and not binding in law."

In *Hammond on Contract*, Sec. 135, it is said:

"The courts are not always discriminating in the use of the words 'voidable' and 'void,' and where the word 'void' is often used, 'voidable' is more obviously meant. This want of discrimination will be found to occur in many of the cases in terms holding infants' contracts to be void. A majority of these cases appear to establish that the contract cannot be enforced against an infant or some other collateral point equally consistent with its being merely voidable and not void. In any event, by the weight of authority both in America and England, the doctrine that an infant's contract may be absolutely void does not prevail, and, subject to one exception, his contracts are valid if he elects to treat them so when he comes of age."

It is difficult to see why a deed executed by a minor Indian citizen, even treating the Act of May 27, 1908, as creating a restriction on alienation, should be void instead of voidable; should fall without instead of being included within the general rule. The act of May 27th, does not so provide, and it is evident from a review of the whole legislation on the subject that such was not the intention of Congress. It did not intend such conveyances, after the passage of the Act of May 27, 1908, to be void in



the precise technical meaning of that term, for in the Creek and Cherokee Agreements it declared certain conveyances and contracts therein prohibited should be void, incapable of ratification and that no rule of estoppel should apply.

Congress has never hesitated to declare forbidden leases, contracts and deeds incapable of ratification, affirmance or adoption, when it so intended, in language so plain and explicit as to be incapable of being misunderstood, and when in regard to the same subject matter, in reference to the same classes of people, dealing with the same character of contracts, it in prior instances so expressly declares and in subsequent instances fails to so declare, is not the implication emphatic and convincing that it did not so intend? Is not such failure equivalent to the withdrawal of the theretofore existing express prohibition? It is not an implied acknowledgment that the theretofore existing stringent prohibition was too severe and drastic and that the interests and welfare of the special objects of its solititude and paternal care would be advanced by its omission? Is not this presumption more weighty, entitled to more respect, more appealing to our confidence and reason when the omission occurs in an act whose declared purpose is to remove all restrictions from certain designated classes and in nearly, if not all cases, decreasing the then existing restrictions?

V.

Conceding that the lease of August 24, 1909, was void and, also, the lease of February 8, 1911, they were susceptible of adoption or ratification, and, in fact, were adopted, ratified and confirmed, and, such being the fact, this cause should be affirmed, although this Court may be of the opinion that the construction given the Act of May 27, 1908, by the Supreme Court of Oklahoma, is erroneous.

The lease of February 8, 1911, was made when Gilcrease was in fact of age, and is, as was found and determined by the Oklahoma courts, free of any vice and to be within itself a sufficient oil and gas mining lease. Therefore, it is binding between the parties, and conclusive of this case unless this court, disregarding the rule announced by the Circuit Court of Appeals of the Eighth Circuit and the Supreme Court of Oklahoma in many cases, should determine that, at the date of its execution, Gilcrease was a minor as shown by the enrollment records. In such event, it is necessary to determine whether such lease has been ratified or adopted if it could be ratified and adopted. We assume that this court will not set aside the deliberate judgment of the trial court and that of the Supreme Court upholding this lease, merely on account of an erroneous construction of the Act of May 27, but if, notwithstanding such erroneous construction, the judgment in this cause should have been affirmed by the Supreme Court of Oklahoma, this court will



leave such judgment in force and effect, and merely correct the erroneous construction of the Act of May 27.

After the execution of this contract, Gilcrease permitted, as shown by the opinion of the Supreme Court of Oklahoma, the defendants to develop the land described in the lease, and incurred a liability therefor of \$60,000.00 (Record, p. 118, marg. p. 940); and after Gilcrease was of age as shown by his own contention under any construction of the Act of May 27, defendant Martin released a liability of \$12,500.00, with the knowledge and in the presence of Gilcrease, on the assumed validity of such lease (Printed Record, p. 118, marg. p. 940), and Gilcrease purchased from Martin, on December 11, 1911, three-fourths of Martin's one-fourth interest in the lease (Printed Record, marg. p. 940), for an agreed consideration, as shown by the petition of plaintiff, of \$31,000.00, and, at the same time permitted Martin to convey his remaining interest to G. R. McCullough, and signed division orders by which pipe line companies were to pay to Gilcrease 9/16 of the proceeds of the oil produced from said land, and the defendants' 7/16 of the oil produced (Stipulation, Printed Record, p. 187). These acts constitute an affirmance or adoption of the lease of February 8, 1911, in fact, and the only question that can be raised is whether the lease could be adopted or ratified as a matter of law.

The Original Creek Agreement, as amended and

supplemented by the Supplemental Creek Agreement, 32 Stat. L. 500, in paragraph 16, declares that any agreement or conveyance of any kind or character, violative of its provisions, should be absolutely void and not susceptible of ratification in any manner, and that no rule of estoppel should ever apply to prevent the assertion of its invalidity. After the enactment of the Supplemental Treaty, the Act of April 26, 1906, was passed forbidding certain transactions with Indians and Indian lands. This act, however, did not declare that Indians, as to acts forbidden, should be deprived of the power to ratify or confirm such acts when freed from Departmental control and when the period against alienation had expired, or that no rule of estoppel should ever apply to prevent the assertion of invalidity. The Act of May 27 repeals all restrictions theretofore existing in reference to the lands of the Five Civilized Tribes, and it is to be remarked that such act, in no place except Section 5, declares any of the forbidden acts to be void, and Section 5 of the Act, relating to sales and leases of restricted lands, while under restrictions, declares such sales and leases to be absolutely void, but does not contain any provision against the power of the Indian to confirm or ratify the forbidden acts after the expiration or removal of restrictions, nor does it provide against the application of the rule of estoppel; and the absence of such provision is to be especially remarked for the reason that Section 19, of

the Act of April 26, 1906, which is repealed by the Act of May 27, 1908, expressly provides that any deed executed in performance of a contract, made while the land was subject to restrictions, should be void. This clearly shows that, under the Creek Treaty, and under the Act of April 26, 1906, Congress intended to prevent affirmance of contracts which were prohibited at the time of their execution, and to prevent having the doctrine of estoppel applied to Indians to prevent them raising the question of such invalidity. Such an intention, purpose and design is wholly absent from the Act of May 27. The omission from the Act of May 27, of the language preventing ratification and adoption, and prohibiting the application of the rule of estoppel shows that Congress did not intend the things prohibited by the Act of May 27, 1908, to be absolutely void in the sense that they could not be ratified or adopted.

The prohibition against adoption, ratification and affirmance of a contract is restriction on alienation. The Act of May 27, 1908, removed the prohibition against doing the acts set out in the treaties and the Act of April 26. It also repealed the further restrictions against alienation which forbade the ratification and approval of conveyances at a time when, but for such prohibition, the Indian could ratify and affirm. This shows that, *when Congress intended a prohibited act, in reference to an Indian's control over his allotment, to be incapable of ratifi-*

*cation, it has not hesitated in express words so to declare.* It also shows that Congress did not believe that the restrictions against alienation for a certain period of time were sufficient to prevent the ratification, affirmance or adoption of such prohibited contracts when made where such affirmance or adoption took place at a time when the Indian was free from restriction, else it would not have deemed it necessary to have so declared at length and with emphasis.

At the time of the passage of the Act of May 27, 1908, there existed two restrictions resting on the lands of minor Creek Indians of less than half blood. One was the direct and absolute prohibition against a sale or lease, and declaring such sale to be void. The other restriction was the prohibition against ratification of any such deed, lease, or contract, and declaring that no rule of estoppel should ever affect the right to assert the invalidity of such deed, lease or agreement. The passage of the Act of May 27, 1908, repealed all theretofore existing restrictions, and, conceding for the purposes of the argument that the Act of May 27 places a restriction on the lands of minors of less than half blood, we then have two distinct stages of the policy in reference to alienation of Indian lands: First, one in which Congress did not content itself with merely declaring deeds, leases, etc., void or absolutely void, but provided that none of such instruments should be ratified, confirmed or adopted, and

that no rule of estoppel should prevail against the assertion of the invalidity of such instruments; second, one in which Congress believed the best interest of the Indian would be subserved by merely declaring the deeds, leases, etc., void, and eliminating the further prohibition or restriction against alienation of adoption, ratification or affirmance, and believed it unwise to again declare against the application of the rule of estoppel. No provision against ratification or adoption, no prohibition against the application of a rule of estoppel being found in the Act of May 27, 1908, *we are forced to conclude that no prohibition was intended.*

Congress must be held to have been acquainted with legislative history, and to have passed the Act of May 27, 1908, and used the language therein contained, with full knowledge that the effect of the language and of the passage of the act would be to repeal all statutory enactments prohibiting confirmation, adoption, ratification or estoppel, as applied to prohibited Indian contracts.

Conceding for the purposes of the argument that the Act of May 27, 1908, imposes a restriction on land based on the fact of minority alone, what in that act prevents a confirmation, ratification, affirmance or adoption of a deed or lease made to the land after the Indian has arrived at full age? We have seen there is no express provision prohibiting the same. When of full age the Indian would have the right to make a new deed or lease



What then would prevent the adoption or ratification of an existing lease or deed? It would not be immoral or illegal in its terms. *Why grant the Indian the power to make a deed or lease and say you cannot ratify or adopt an existing deed or lease?* Is not the latter included in the first? What is it but a species, a method and manner of making a deed or lease? We have seen that the Act of May 27, 1908, repeals the provisions of the Creek and other treaties providing that certain instruments should be incapable of ratification and affirmance, and that no rule of estoppel should ever apply. And the courts of Oklahoma have declared such act frees land of the character involved in this action of all restraints imposed by Federal treaty or acts except such as may be found in the act itself. A perusal of that act fails to disclose any provision declaring contracts made in reference to lands on which restrictions have been removed subsequent to the act to be void. By express wording of the Act of May 27, 1908, the only contracts, *et cetera*, covering lands from which restrictions are not removed by such act which are declared void are contracts made prior to or after the passage of that act and made at a time when *such lands were restricted*. The only way in which we can hold such contracts void and incapable of ratification is from language used by the Supreme Court of Oklahoma in cases where such question was not before the court.

Under the Act of May 27, 1908, or rather the construction of that act contended for by petitioner, Gilcrease, either on February 8, 1911, or June 9, 1911, would have full authority to deal with his land. Having authority then to deed or lease, he would necessarily have authority to ratify, adopt or confirm a previous deed or lease, unless prohibited by express provision of statute. The unrestricted ownership of the land of and by itself would imply such power as it would be but *one of the methods by which the land could be conveyed*. In *United States v. Wright*, 197 Fed. 297, the Circuit Court of Appeals of this circuit, having before it certain oil and gas mining leases made by a Quapaw minor Indian under restrictions and its power to adopt them said:

"Most of the questions here raised were disposed of in those cases, but in none of them was the question of infancy in any way involved. It has never been held that the government was any more the guardian of a minor Indian than of adults, but even if there was some peculiar guardianship of minor Indians, that would not enable the government to bring suit after the Indian had reached his majority, to set aside leases made during his infancy. After he reached his majority Hunt re-dated, re-executed and extended this lease. This was a distinct ratification by him."

*In United States v. Western Investment Com-*



*pany et al.*, 226 Fed. 726, the Circuit Court of Appeals by Judge Adams, said:

"Act May 27, 1908, 35 Stat. 312, prohibiting the conveyance of any interest in an allotment by a full-blood Indian heir of the allottee without the approval of the court having jurisdiction of the settlement of the estate of the deceased allottee, renders a deed of such heir voidable if made without such approval."

This case would seem to hold that a deed made by a full-blood Indian, not in accordance with the Act of May 27th, could be adopted and ratified by such Indian at any time after his restrictions should be removed. And why not? *Why with the power and authority to sell should it be necessary to go through the form of writing a new deed instead of adopting an already existing deed? Each of the acts would in essence be the same, as the result of each would be the sale of the land.*

In *Hartman v. Butterfield Lumber Company*, 199 U. S. 235, 5 L. Ed. 217, the Supreme Court of the United States say:

"For the purposes of this case it may be conceded that the contract made before the patent, was, by virtue of the policy of the United States, as disclosed by its statutes, void, and could not have been enforced by the Norwood & Butterfield Company, but the contract was not inherently vicious and immoral. It was simply void because in conflict with the Federal statutes. *Anderson v. Carkins*, 135 U. S. 483, 34 L. Ed. 272, 10 Sup. Ct.

905. When the patent issued the full legal title passed to the patentee. He could do with the land that which he saw fit; sell or give it away, and if he voluntarily conveyed it he could not thereafter repudiate the conveyance. He might well have thought that having received the money from the company to enable him to pay for the land, it was equitable that he should convey that interest which he had agreed to convey. At any rate he had a right to exercise a choice in the matter, and, having exercised it, he at least cannot complain."

In *Kinzer v. Davis*, 167 Pac. 753, not yet officially reported, it was sought to set aside the deed of an Indian of one-eighth blood, executed on August 12, 1908, on the ground that, prior thereto and while under restrictions, the Indian had executed a deed for the same land, and, at the same time, entered into a contract to convey such land on the expiration or removal of restrictions. It was contended that the two deeds were to the same grantee, the last deed was void, because the Act of April 26 expressly declared void a deed made in pursuance of a contract entered into prior to removal of restrictions and the last deed was made to carry into effect such a contract. In passing on the question, the court say:

"It is urged by counsel that the deed of August 12, 1908, was void under the terms of the Act of Congress of April 26, 1906, (34 Stat. L. 137). The lower court sustained this contention, and directed a verdict in favor of the

defendant in error. The deed of August 12, 1908, is not to be construed under the terms of the Act of April 26, 1906, but is to be construed under the Act of Congress of May 27, 1908, (35 Stat. L. 312). That the last mentioned act repealed the former is no longer open to dispute. *MaHarry v. Eatman*, 29 Okla. 46, 116 Pac. 935; *Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384; *Henley v. Davis*, 156 Pac. 337; *McKeever v. Carter*, 157 Pac. 56; *Ehrig v. Adams*, 169 Pac. (No. 5077, not yet officially reported). If the Act of Congress of April 26, 1906, controlled, the second deed might properly be held void, because of the contract entered into prior to the removal of restrictions; that act containing the express provision making such deeds void. The Act of May 27, 1908, contains no such provision. It provides that the lands allotted to Indians of less than one-half blood, 'shall be free from restrictions.' Had it been the purpose of Congress to continue restrictions against selling in pursuance to a contract entered into prior to the removal of restrictions, a provision like that contained in Section 19 of the Act of April 26, 1906, would have been incorporated in the repealing act. We are not unmindful of the rule urged by counsel, to the effect that a void deed cannot be confirmed, and that fraud which renders the original deed void taints and destroys a confirmatory deed. No such question is presented under the facts in this case; there being no allegation of fraud or duress. The first deed was void because it was prohibited by law, and not from fraud or duress. It was not an immoral contract, merely an illegal one. When the allottee ex-

executed the deed of August 12, 1908, there were no restrictions imposed by the law against his voluntary alienation of the land in question. He held the land free from all restrictions against his voluntary conveyance. It appears that he had been advised by the United States Indian Agent that his deed and contract entered into prior to the removal of restrictions were void, and that he was under no legal obligations to convey the land to McGuffin. Notwithstanding this information, he voluntarily sought McGuffin, and offered to execute the deed on payment of \$140.00, the balance of the consideration mentioned in the contract. He was free at that time to do so."

In *Welch v. Ellis*, 163 Pac. 321, not yet officially reported, the Supreme Court of Oklahoma held a new deed made without consideration, by a Cherokee freedman, to take the place of a deed executed by him when a minor and, as held by the court, under restrictions, to be good, and, in disposing of the contention that such deed was void, say:

"It must not be forgotten that the right of a citizen of the Five Civilized Tribes to enter into a valid and binding contract is precisely the same as that of the ordinary citizen of the state, except as limited or restricted by some Act of Congress."

The court then further say:

"It is settled in this jurisdiction that the Act of May 27, 1908, (35 Stat. L. 312, c. 199) was intended as a substitute for all prior laws,

and operated to repeal all the previous acts of like nature, and to establish a new scheme of restrictions governing the lands of citizens of the Five Civilized Tribes (citing authorities). At the time of the passage of the Act of May 27, 1906, the restrictions upon the lands of freedmen, both as to surplus and homestead allotments, were removed. Therefore, we must look to Section 5 of the Act in determining the validity or invalidity of the deeds to both tracts."

The court then says:

"The deed was made after the plaintiff had attained his majority, is a grant in *praesenti*, and does not purport to affect the title to the land prior to removal of restrictions therefrom. The Act of Congress does not in terms or by implication purport to confer upon the Indians the full power to alienate their lands upon reaching their majority, upon condition that they receive full value in consideration for their sale. The general purpose of Congress was to provide restrictions upon alienation during such a period as would be sufficient in their judgment to fit the Indian wards of the government to deal at arm's length with their white neighbors in the matter of the disposal of their allotted lands. In the case at bar minority was the sole remaining disability imposed by law, both as to surplus and homestead, at the time the various deeds were executed. It will be observed that none of the acts of Congress removing restrictions attempt to make the right to convey, after restrictions are removed, depend upon the adequacy of the



consideration received by the grantor. In that respect, after the restrictions upon alienation are removed, the Indian citizen stands upon an equality with the ordinary citizen of the state."

The court then, after reviewing some Oklahoma decisions, goes on to say:

"So we conclude that, upon the plaintiff attaining his majority, the whole legal title to his lands vested in him; that thereafter he could dispose of it as he saw fit—give it away, or sell it for any consideration, either legal or moral, which seemed to him sufficient. As the plaintiff herein voluntarily conveyed his land after attaining his majority, he cannot now, after the lapse of many years, repudiate the conveyance upon any except the ordinary equitable grounds. This latest deed to his surplus allotment not being violative of any statute and there being no equitable grounds for setting it aside alleged or proven it must stand. Since there was a legal as well as a moral obligation upon the plaintiff to restore the money received from Ellis in consideration for the void deed, it seems to us that his voluntary recognition of this obligation, after attaining his majority, was as commendable as such action is generally rare in this class of cases."

In *McKeever v. Carter et al.*, 53 Okla. 360, 157 Pac. 56, this court, in the third syllabus, say:

"The provisions of section 5 of the Act of Congress of May 27, 1908, (c. 199, 35 Stat. L.,

p. 3313), 'that any attempted alienation, encumbrance, deed, mortgage, contract to sell, power of attorney or other instrument or method of encumbering real estate made before or after the approval of this act which affects the title of the land allotted to allottees of the Five Civilized Tribes, prior to the removal of the restrictions therefrom, and also any lease of such restricted lands made in violation of law, or after the approval of this act, shall be absolutely null and void,' does not affect the deed made after all restrictions upon the alienation of the lands therein described were removed."

In the body of the opinion in said case the court, discussing Section 5 of the Act of May 27, 1908, say:

"By this provision any deed or contract to sell made before the removal of restrictions would be void, and in case of a contract to sell specific performance would be denied. But this does not necessarily mean that after the allottee has attained his majority, where all restrictions have been removed, he may not then, upon a sufficient consideration, execute a valid conveyance to his allotted lands."

The court then goes on to review the Act of April 26, 1906, and contrasts it with the Act of May 27, 1908, and in this connection say:

"By the language of this section a deed made after the removal of restrictions, if made in pursuance of an agreement entered into before the removal of such restrictions, is



void. The Act of May 27, 1908, contains no such language as will be seen from the section quoted *supra*, but simply enacts that all attempted alienations and contracts to sell entered into before removal of restrictions are declared void. There is no prohibition against selling after restrictions are removed."

The court then reviews the cases of *Lewis v. Allen*, and *Casey v. Bingham*, and then say:

"In the light of these authorities it would seem that even though the agreement to convey the land entered into by the plaintiff with the defendant, and while plaintiff was a minor, was void, and that same could not be enforced had plaintiff declined to perform the same, yet there was no legal impediment in the way of plaintiff conveying his lands to any grantee he chose after reaching his majority, upon any legal consideration which he saw fit to accept."

The court then says further:

"There is no evidence of coercion, undue influence, or other grounds of equitable interference that would impeach either of said last two named conveyances, and if plaintiff was, on the date of their execution, an adult, he was capable in law of conveying said lands to whomsoever he chose, for any lawful consideration, and could, if he saw fit, give said lands away; and, when he executed and delivered these deeds, and accepted the consideration, said deeds were valid and binding conveyances, and operated to transfer plaintiff's title to the grantee therein named, provided he had then reached his majority."

The court then reviews the case of *Ehrig v. Adams*, 152 Pac. 594, which held a deed ratifying and confirming a deed made during minority was void, and of that case say:

"The opinion is based on the theory that the conveyance to Adams prior to the removal of restrictions was void and incapable of ratification, and that the second deed to the same grantee could not operate to pass the allottee's title because tainted with the same illegality. This might have been true prior to the passage of the Act of Congress of May 27, 1908, but as we have seen that act was intended as a revision of the entire subject of restrictions on the character of lands here involved, and operated as a repeal of the Act of April 26, 1906. The opinion in this case is in conflict with the opinion in *Lewis v. Allen*, *supra*, *Henly v. Davis*, *supra*, and the views herein expressed, and is hereby overruled."

The court, further speaking of the construction of the Act of May 27, 1908, say:

"This has been the construction placed upon that act by the Department of Justice. It is a matter of common knowledge to the bench and bar of this state, that the United States, acting under the powers of guardianship, instituted a large number of suits in the United States Court for the Eastern District of this state to cancel and remove as clouds upon the title of allottees a vast number of conveyances which it was alleged had been procured thereto in violation of the congressional restrictions. Since the passage of the Act of May 27, 1908,

it has been the policy of the Department to investigate each individual case, and where sufficient consideration has been paid for the lands purchased and restrictions have been removed so that valid conveyances could be executed to permit the title of the purchaser to be perfected by the execution of new conveyances, and to attain this result the lands conveyed have frequently been appraised, and where the consideration paid in the former conveyances was not adequate, upon payment of an additional sum, which, together with the amount already paid, would equal the fair value of the land, the suits by the government have been dismissed, and many thousands of titles involved have in this way been quieted."

In *Henly v. Davis*, 156 Pac. 337, not officially reported, the court, through Commissioner Bleakmore, says:

"The only restriction upon alienation of the allotted land of the plaintiff herein imposed or continued in force by the Act of May 27, 1908, was that which rendered her personally powerless to contract with reference thereto while a minor as defined by that act. After she became eighteen years of age, as shown by the enrollment records of the Commissioner to the Five Civilized Tribes, that restriction was *ipso facto* removed, and that act, having spent its force so far as her allotment and its future disposition were concerned, became inoperative. The deed of June 2, 1910, is apparently a separate and independent conveyance voluntarily made by the plaintiff, the execution of which was perhaps prompted by a

sense of her moral obligation to the defendant. The land was then hers, free from all restrictions upon alienation, and she could part with it to whomsoever she chose upon any lawful consideration she saw fit to accept, or without consideration. When she thus conveyed it by proper deed for the recited consideration of \$1.00 and other valuable considerations, such conveyance was binding upon her."

In *Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384, the court, speaking of a conveyance made after the Indian had arrived at majority, and executed in accordance with an agreement made during minority, that she should do so when she became of age, say:

"Mrs. Lewis knew at the time she entered into the contract for the second deed, and also at the time of executing this deed, that she had taken \$4,400.00 of Allen's money, for an invalid deed; that she and her husband had spent this money; and that she still held the legal title to the land; that she was in need of funds to assist her husband out of trouble, and she wanted to help him; that she was under no legal obligation to give the second deed, but that, by doing so, she could get money to relieve her pressing necessities, and at the same time discharge a moral obligation imposed upon her by the circumstances connected with the first deed. The jury had a right to, and doubtless did, take all these things into consideration in finding that the \$500.00 was an adequate consideration for the second deed \* \* \* We do not know what

weight or influence the moral obligation had as an inducing cause in prompting Mrs. Lewis to enter into the contract for the deed and in performing this contract, but after the delivery of the deed, it then became a legal and binding conveyance, and the court below was right in so holding."

It is difficult to conceive if a minor's deed or lease was absolutely void, incapable of ratification or adoption, how there could be any moral obligation resting upon anyone in connection with the transaction, how any court could speak of the *moral obligation imposed by such absolutely illegal and void contract as an inducing cause* to enter into another contract, and take *such consideration to be sufficient to sustain a subsequent deed or contract founded thereon*. To speak of a moral obligation in such connection is a contradiction in terms. There cannot rest upon a person, Indian or white, a moral obligation, which, if he performs when of age, the court will set aside, yet this is the result of the argument of the petitioner.

In *Capps v. Hensley*, 23 Okla. 311, 150 Pac. 515, the court had under consideration a lease which was admittedly *void or voidable* by being executed in *direct contravention of the express provisions of Congress* being a lease of an Indian minor and not made by her guardian as required by the then existing statutes. Congress declaring a lease so made to be void. The Indian citizen died,



and the lease was held good against her heirs, and, passing on this question, the court say:

"We believe that no one will contend that a contract such as it here involved was one that the infant could not have made after she attained her majority. If she could make it, then there is no doubt in our mind about her power to adopt it, or affirm it, should she so elect, and the same power over this property and contract which the infant would have possessed after attaining majority had she lived, on her death, could be exercised by the father to the extent of his estate after he came into possession of it. We think there can be no doubt but that had the Indian in this case survived, and had she attained her majority during the term of this contract, and had she received the money under it just as her father did, it would have amounted to an adoption or affirmance of it. This being true, the recognition of the father of the lessees whom he placed on the land, the reception from them of the rents under the contract, amounted to an adoption or affirmation of the same, and protected the lessee in his possession. This conclusion on our part necessarily results in the reversal of the judgment of the trial court."

The case of *Capps v. Hensley* has been frequently referred to in Oklahoma, and cited with approval both by the bench and bar of the state, having been cited by the Supreme Court proper and relied on in about at least six cases.

In *Beck v. Jackson*, 23 Okla. 813, 818, 101 Pac. 1109, the court, after citing *Capps v. Hensley* with approval, and discussing the effect of a minor Indian contract relating to land, said:

"The contract being absolutely void, a court of equity can not breathe the breath of life into it. Nothing could give it any validity except confirmation by the minors in some manner recognized by the law, and they, instead of confirming it, are assailing it by their legally constituted guardian."

In *Schreyer v. Turner Flouring Mills Company*, 43 Pac. 419, the Supreme Court of Oregon say:

"In their primary signification, there is a manifest distinction between adoption and ratification. The one signifies to take and receive as one's own that with reference to which there has existed no prior relation, either colorable or otherwise; while the other is a confirmation, approval or sanction of a previous act, or an act done in the name and behalf of the party ratifying without sufficient legal authority; that is to say: The confirmation of a voidable act."

In *McArthur v. Times Printing Co.*, 51 N. W. 216, the Supreme Court of Minnesota say:

"The act of a corporation, in adopting such engagements, is not a ratification which relates back to the date of the making of the contracts by the promoter, but is, in legal effect, the making of a contract as of the date of the adoption."



In *Clough, et al. v. Clough*, 33 Me. 487, the court say:

"If one acknowledges and delivers a deed which has his name and seal affixed to it, the deed is valid, no matter by whom the name and seal were affixed, no matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption, so distinct and emphatic that they will preclude the grantor from afterward denying that the signing and sealing were also his acts. They are his by adoption. Without delivery, the instrument has no validity or force. By our statutes, the instrument is not complete without acknowledgment. ~~Th~~ one or both of these acts are performed, the instrument has no more validity than a blank deed. By taking the instrument in this incomplete condition, and completing it, the grantor makes it his deed in all particulars. He adopts the signature and seal the same as he does the habendum and the covenants which were inserted by the printer on the blank. The deed is not sustained on the ground of ratification, but adoption. No matter by whom the signing and sealing were performed, or whether with or without the grantor's consent, by completing the instrument he adopts what he had previously done to it and makes it his for all particulars."

In Wald's *Pollock on Contracts*, 3rd ed. 620, it is said:

"A party to an apparent agreement, which is void by reason of fundamental error, has more than one course open to him. \* \* \* He is

entitled to treat the supposed agreement as void, and is not as a rule, prejudiced by anything he may have done in ignorance of the true state of the facts, yet, after that state of facts has come to his knowledge, he may, nevertheless, elect to treat the agreement as subsisting; or, it would be more correct to say, he may carry to execution, by the light of correct knowledge, the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction, for there is nothing to confirm, but he enters into a new one."

So we say that Gilcrease has, by reason of permitting defendants to incur a large indebtedness for the development of the property, by the purchase back from Martin of a part of Martin's interest therein, by permitting Martin to liquidate a claim of \$12,500.00 on the assumption of the validity of said contract, by signing division orders recognizing the interest of the defendants in said premises and directing the payment of large sums of money to them thus rendering the defendants and the pipe line companies responsible to him for the amount so paid by his order and direction confirmed, ratified and adopted the leases, both of February 8, 1911, and August 24, 1909 and that the effect of his acts, at least, is the same as if a new contract containing such provisions had been written and signed by him at the date of the performance of the acts above alluded to. These acts are acts of recognition and adoption so distinct and emphatic

that they preclude Mr. Gilcrease from now denying the binding force and validity of such contracts upon him, and prohibit him from seeking to set aside the judgment upholding such leases.

It is urged by counsel for petitioner, and it is stated in the opinion of the Supreme Court of Oklahoma, that *Barbre, et al. v. Hood*, 228 Fed. 658, holds that a deed executed by a minor Indian is incapable of ratification and affirmance, and, consequently, that the argument here advanced is opposed to the express judgment of the Circuit Court of Appeals of the Eighth Circuit. If such statement be correct, it is worthy of careful consideration in determining the weight to be attached to our argument in favor of ratification and adoption. An examination of the *Barbre-Hood* case, however, discloses that the Supreme Court of Oklahoma and counsel, alike, are in error as to the effect of such case. In that case, appellants and appellee each claimed under the same allottee—the appellant by a warranty deed dated April 23, 1910, when the allottee was a minor between twenty and twenty-one years of age; the appellee, by a deed from the allottee dated September 3, 1910, when he was of full age. There were no acts of ratification set up or attempted to be shown in the case. In fact, there was but a few months difference between the two deeds. The deed executed when a minor was, of course, disaffirmed by the deed executed when the allottee was an adult. It was sought to avoid the effect of this disaffirmance on

for other purposes,' is a revising act, and was intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of an act of Congress approved April 26, 1906 (34 Stat. 137, c. 1876), and previous congressional enactment in conflict therewith on the same subject.

"Under the provisions of section 9 of the Act of Congress of May 27, 1908 (35 Stat. 312), the death of an allottee of the Five Civilized Tribes operated to remove all restrictions upon the alienation of said allottee's land. The first proviso in said section, 'That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee,' imposed a merely personal restriction on the full-blood Indian heirs. The restriction thus imposed was simply an incapacity to convey without the approval of the proper county court similar to the disability of a minor to sell him his lands.

"Lands inherited by full-blood Creek Indian minors from a full-blood Creek allottee are not 'restricted lands,' within the purview of the proviso in section 6 of the act of May 27, 1908 (35 Stat. 312), prohibiting the sale or incumbrance of restricted lands of living minors, except by leases authorized by law, by order of the court, or otherwise."

It is difficult to see how, under Section 9 of the Act, restrictions on land are not imposed, and yet the Act imposes restrictions on account of minority. If the disabilities imposed, as would seem to be the holding of the Supreme Court of Oklahoma, are only

the disabilities of ~~minority~~, ~~disabilities~~ personal in character, based on personal incapacity or disqualification, then it seems to us it must of necessity follow that a minor could deal with his lands under the Act of May 27, 1908, subject to such disabilities; that is, his dealings would be voidable but such dealings could be *vitalized by him when free from such disabilities.*

The petitioner devotes a considerable part of his brief in presenting his contention that the instrument dated February 8, 1911, is in and of itself an insufficient oil and gas mining lease. While the argument presented is, in our judgment, unsound and in our opinion the instrument of February 8, 1911, is under all the authorities a sufficient oil and gas mining lease, we do not enter into the discussion of the question as it appears to us it is purely a matter of state law involving no Federal question, and hence, will not be and cannot be reviewed by this court in this proceeding.

Respectfully submitted,

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GILCREASE *v.* McCULLOUGH ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 167. Argued January 21, 1919.—Decided March 3, 1919.

In declaring the enrollment records of the Commission to the Five Civilized Tribes conclusive evidence of age, the Act of May 27, 1908, c. 199, § 3, 35 Stat. 312, 313, does not exclude other evidence on the subject consistent with the records and enrollment. P. 180.

Hence, where the enrollment record purported to show the age of an Indian, at time of application for enrollment, in years only, evidence that he was several months older was admissible. *Id.*

162 Pac. Rep. 178, affirmed.

THE case is stated in the opinion.

*Mr. A. J. Biddison* for petitioner.

*Mr. James B. Diggs*, with whom *Mr. Frederick deC. Faust*, *Mr. F. C. Proctor*, *Mr. D. Edward Greer*, *Mr. Rush Greenslade* and *Mr. W. C. Liedtke* were on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

Thomas Gilcrease, a Creek Indian of one-eighth blood, received, under date of December 15, 1902, an allotment of surplus land under Act of Congress, March 1, 1901, c. 676, 31 Stat. 861, as amended by Act of June 30, 1902, c. 1323, 32 Stat. 500. On February 8, 1911, his twenty-first birthday, he executed to McCullough and Martin an oil and gas lease thereof. Later he brought suit in a state court of Oklahoma to set it aside, insisting that, under the applicable enrollment record of Creek citizenship, he must be assumed to have been under age at the time the lease was executed, although he had in fact



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attained his majority. The trial court entered judgment for the defendants which was affirmed by the Supreme Court of the State; and a rehearing was denied, January 9, 1917. 162 Pac. Rep. 178. The case comes here on writ of certiorari. 243 U. S. 653.

The only substantial question submitted is this: Did the entry concerning Gilcrease's age made in the enrollment record of Creek citizenship preclude defendant from showing that he was actually of age when the lease was executed? The decision of that question depends wholly upon the construction to be given § 3 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 313, as applied to the record.

Section 3 provides:

"That the rolls of citizenship and of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribes and of no other persons to determine questions arising under this Act and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman."

The enrollment record introduced in evidence, so far as material, is as follows:

Residence: Leonard.

Creek Nation.

Creek Roll.

Post Office: Mounds, Ind. Ter.

Dawes' Roll No.	Name	Relationship to person first named	Age	Sex	Blood
1504	1 Gilcrease, Lizzie		25	F.	$\frac{1}{4}$
1505	2 " , Thomas	Son	9	M.	$\frac{1}{4}$
1506	3 " , Eddie	"	7	"	$\frac{1}{4}$
1507	4 " , Ben	"	5	"	$\frac{1}{4}$
1508	5 " , Lena	Daughter	3	F.	$\frac{1}{4}$
1509	6 " , Florence	"	1	"	$\frac{1}{4}$
Citizenship certificate issued— June 9th, 1899.			June 9/99.		



Gilcrease insists that the entry "June 9/99," near the lower right-hand corner of the enrollment card, signifies that the application for his enrollment was made on June 9, 1899; that in giving his age as "9," the roll declared him to be exactly nine years old on June 9, 1899; and that, consequently, in the absence of other evidence to the contrary in the enrollment record, he must be deemed to have been under age on February 8, 1911.

But there was no declaration or finding of fact by the Commission that Gilcrease was exactly 9 years old on June 9, 1899. The declaration that a person is 9 years of age signifies, in the absence of conditions requiring exact specification, merely that he has reached or passed the ninth anniversary of his birth and is still less than ten years old. There was neither a statute nor a regulation of the Commission which required an exact specification of age. Nor did the printed blank used for the enrollment provide a space either for entering the date of applicant's birthday or for entering the number of months and days by which his age exceeded a full year. Furthermore, the enrollment card itself bears positive evidence that it did not purport to represent the applicant as being exactly 9 years old on the day of application. For this same card records, in like manner, on the assumed date of application, also the ages of his mother, of three brothers, and a sister. Is the court expected to believe that the Commission found, that the six members of the family were all born on the ninth day of June?

Gilcrease insists, however, that the act makes the enrollment record not merely "conclusive," but the exclusive "evidence as to the age" of the citizen; or, in other words, that Congress has provided, not a rule of evidence, but the following rule of substantive law: Whenever a member of the Five Civilized Tribes is stated in the enrollment record to be a certain number of years old and the day of his enrollment is stated therein, he shall be unable

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to convey his lands so long as the rolls do not show affirmatively that he is 21 years old. For this contention there is no support in the words of the statute; nor is there any in reason. As well might it be contended that where the record states the number of the applicant's years, but gives only the year and not the day or the month of the application of enrollment, evidence could not be introduced to show that the application was made before December 31st of the year given; or that, if no age whatever appeared in the enrollment record, the citizen must for 21 years after the date of enrollment be conclusively presumed to be a minor. The enrollment record is, of course, conclusive as to that which it in terms recites or which is necessarily implied from the words and figures used. But there is no indication of an intention on the part of Congress that facts not inconsistent with the recitals of the record shall not be proved, whenever relevant. The roll had already been held to be practically conclusive as to facts, the determination of which was a condition precedent to enrollment. Compare *United States v. Wildcat*, 244 U. S. 111. The purpose of § 3 of the Act of May 27, 1908, seems to have been simply to make the record conclusive as to age in so far as it purports to state age. The cases in the lower federal courts, the recent decisions in the Supreme Court of Oklahoma, and the great weight of all the authorities support the proposition that, when the age is stated simply in years or whenever the age is not stated definitely by the addition of the months or days, other evidence may be introduced to supplement the record by proving these and thus establish the exact date of birth.<sup>1</sup>

*Affirmed.*

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<sup>1</sup> *Etchen v. Cheney*, 235 Fed. Rep. 104 (C. C. A.); *McDaniel v. Holland*, 230 Fed. Rep. 945 (C. C. A.); *Cushing v. McWaters*, 175 Pac. Rep. 838; *Tyrell v. Shaffer*, 174 Pac. Rep. 1074; *Jordan v. Jordan*, 162 Pac. Rep. 758; *Heffner v. Harmon*, 159 Pac. Rep. 650. Compare also